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In The

# Supreme Court of the United States

G.K. LTD. TRAVEL, W. H. GILLISON, KATHLEEN KUSUDO and RAMSAY SIGNS, INC.,

*Petitioners,*

v.

CITY OF LAKE OSWEGO and SANDY INGALLS,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. *Whether government may impose viewpoint based regulations of speech without compliance with strict scrutiny by claiming they have an incidental effect upon speech.*

2. *Whether the sign code complies with the Time, Place and Manner test under the First Amendment or even the lesser standard applied to commercial speech?*

3. *Whether the Ninth Circuit properly exempted content-based regulations of speech occurring on private property and made by private persons, from the procedural safeguards required by Freedman v. Maryland.*

4. *Whether Lake Oswego's design review clause controlling permit approval is unconstitutionally vague as written and applied?*

5. *Whether the district court improperly resolved, and the Ninth Circuit Court of Appeals improperly ratified, conflicts in evidence of material fact necessary to support a summary ruling in favor of Lake Oswego.*

## STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Petitioner Ramsay Signs, Inc. and GK Ltd. Travel, Inc. are privately owned entities. Each has no parent corporation and there is no publicly held company that owns more than 10% of each company's stock.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| Rule 29.6 Corporate Disclosure Statement | ii |
| Table of Authorities | v |
| Opinions Below | 1 |
| Jurisdiction | 1 |
| Constitutional Provision Involved | 1 |
| Municipal Ordinances Involved | 2 |
| Statement of the Case | 2 |
| Legislative History of the Sign Code | 2 |
| Reasons for Granting the Petition | 5 |
| 1. Without review, the government may impose new viewpoint based regulations on speech without complying with strict scrutiny by claiming they have an incidental effect upon speech. [The "di minimus" exception allowing viewpoint discrimination] | 7 |
| 2. The sign code fails to comply with the Time, Place and Manner test under the First Amendment or the lesser standard applied to commercial speech due to a city's failure to present sufficient, uncontradicted evidence of compliance | 9 |
| 3. The Ninth Circuit improperly exempted content based permitting regulations of speech directed at speech occurring on private property and made by private persons, from incorporating procedural safeguards required by *Freedman v. Maryland* | 15 |

TABLE OF CONTENTS – Continued

Page

4. The lower courts improperly authorized a city to continue to employ a subjective design review clause controlling permit approval that is unconstitutionally vague ..... 16

5. The district court improperly resolved, and the Ninth Circuit Court of Appeals improperly ratified, conflicts in evidence of material fact necessary to support a summary ruling in favor of Lake Oswego, thereby creating and affirming entry of a void judgment chilling protected speech which must be vacated ..... 18

## TABLE OF AUTHORITIES

Page

*Adickes v. H.S. Kress & Co.*, 398 U.S. 144 (1970) ..... 20

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) ... 20, 21

*Central Hudson Gas and Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) ..... *passim*

*City of Ladue v. Gilleo*, 512 U.S. 43 (1994) ..... 5, 7, 19

*City of Painesville Building Dept. v. Dworkin & Bernstein Co.*, 733 N.E.2d 1152 (Ohio, 2000) ..... 5

*Cohen v. California*, 403 U.S. 15 (1971) ..... 10

*Dills v. City of Marietta*, 674 F.2d 1377 (11th Cir. 1982) ..... 14

*Edenfield v. Fane*, 507 U.S. 761 (1993) ..... 14, 29

*Foti v. City of Menlo Park*, 146 F.3d 649 (9th Cir. 1998) ..... 29

*Freedman v. Maryland*, 380 U.S. 51 (1965) .... 14, 15, 16, 20

*Grayned v. City of Rockford*, 408 U.S. 104 (1972) ..... 17

*Gresham v. Peterson*, 225 F.3d 899 (7th Cir. 2000) ..... 17, 29

*Haynes v. Mayor of Oradell*, 425 U.S. 610 (1976) ..... 1, 17

*Home Box Office, Inc. v. FCC*, 185 U.S. App. D.C. 142, 567 F.2d 9 (CADC 1977) ..... 13

*Kolender v. Lawson*, 461 U.S. 352 (1983) ..... 17

*La Tour v. City of Fayetteville*, 442 F.3d 1094 (8th Cir. 2006) ..... 6, 8

*Lorrilard Tobacco v. O'Reilly*, 533 U.S. 525 (2001) ..... 29

*Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986) ..... 13

TABLE OF AUTHORITIES – Continued

Page

*Menotti v. City of Seattle*, 409 F.3d 1113 (9th Cir. 2005) ..... 20

*Metromedia v. City of San Diego*, 453 U.S. 490 (1981) ..... 6, 11, 12

*O'Connor v. Boeing N. Am.*, 311 F.3d 1139 (9th Cir. 2002) ..... 20

*Ovadal v. City of Madison*, 416 F.3d 531 (7th Cir. 2005) ..... 10

*Pearson v. Edgar*, 153 F.3d 397 (7th Cir. 1998) ..... 14

*Phillips v. Borough of Keyport*, 107 F.3d 164 (3rd Cir. 1996) ..... 14

*Quincy Cable TV, Inc. v. FCC*, 248 U.S. App. D.C. 1, 768 F.2d 1434 (CADC 1985) ..... 12

*R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) ..... 7, 8

*Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988) ..... 10

*Roberts v. United States Jaycees*, 468 U.S. 609 (1984) ..... 17

*Schneider v. State*, 308 U.S. 147 (1939) ..... 10

*Seung Chun Lim v. City of Long Beach*, 217 F.3d 1050 (9th Cir. 2000) ..... 14

*Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) ..... 15

*Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005) ..... 6

*Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975) ..... 15

*Texas v. Johnson*, 491 U.S. 397 (1989) ..... 11

TABLE OF AUTHORITIES – Continued

Page

*Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002)... 15, 16

*Turner Broadcasting v. Federal Communications Comm.*, 512 U.S. 622 (1994).....*passim*

*United States v. Hausmann*, 345 F.3d 952 (7th Cir. 2003) ..... 17

*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982)..... 17

*West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) ..... 10

## OPINIONS BELOW

The ruling of the United States Court of Appeals for the Ninth Circuit dated January 26, 2006 affirming the decision of the District Court is officially reported at 436 F.3d at 1064 (9th Cir. 2006) and is reproduced at App. A.

The affirmed decision and opinion of the District Court issued March 29, 2004 is officially reported at 2004 U.S. Dist. LEXIS 6984 and is reproduced at App. B.

## JURISDICTION

The ruling of the United States Court of Appeals for the Ninth Circuit sought to be reviewed was entered on January 26, 2006. The petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13.3 because it is being filed within 90 days of entry of an Order of the United States Court of Appeals for the Ninth Circuit on March 15, 2006, denying petitioner's timely request for rehearing and rehearing *en banc*. The Order denying rehearing on March 15, 2006 is reproduced at App. C.

This Court has jurisdiction to review the ruling of the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1254.

## CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the U.S. Constitution is set out at App. D.

## MUNICIPAL ORDINANCES INVOLVED

Lake Oswego Municipal Code, Chapter 47 is set out at App. E.

## STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 (general federal question jurisdiction) and 28 U.S.C. § 1343 (civil rights jurisdiction).

The plaintiff-petitioners, G.K. Ltd. Travel ("GK Travel") and Ramsay Signs, Inc. ("Ramsay") are two Oregon businesses presenting lawful, commercial speech through the medium of a pole sign located on GK Travel's property in the City of Lake Oswego, an Oregon city. The defendants are the City of Lake Oswego municipal government ("city") and Ms. Sandy Ingalls, a former sign code enforcement officer.

### Legislative History of the Sign Code:

The City of Lake Oswego adopted Chapter 47 of its Municipal Code to regulate signs throughout the city. See, e.g., § 47.10.400. App. E-27, E-28. The Sign Code states purposes for which it was allegedly adopted set forth in § 47.03.010. See App. E-5. Prior to enactment of the Sign Code, or any of the amendments thereto, the City of Lake Oswego did not undertake any research or review any studies to determine what, if any impact, the sign regulations would have on the Sign Code's stated purposes.

A design review clause was one of several provisions challenged by petitioners. City Manager Douglas Schmitz admitted during his deposition that the "Design Review

Clause" ("DRC") set forth in § 47.06.200 contained provisions that could be interpreted differently by different employees. See App. E-17, E-18. Schmitz responded to a design review question about how to determine whether a proposed sign was "compatible" with surrounding light poles, benches, trash cans, bike racks, and landscaping where two different people disagree about whether a proposed sign is compatible by admitting there could be a disagreement. See App. P-1, P-2. When asked whether the code phraseology "signs may be reviewed for clarity" meant that the sign was clear to the eye or clear to the reader trying to understand it, he said it could be both. See App. P-3.

During a City Council meeting conducted five years after the 1994 modifications to the sign code that initially banned petitioners' pole signs at a date certain, Council President Rhode addressed removing the "subjective review section" from the sign code. He said that business people complained to him that they needed a sign code with basic criteria to which they could adhere. See App. L-23. He said they found the design review clause in § 47.06.200 that the city repeatedly identifies as "subjective" to be one of the biggest problems with the code and said it would be easier for a business person to let the Planning Department design the sign. *Id.*

At the September 14, 1999 city council meeting, Assistant City Manager Coffee spoke out to preserve the DRC's subjectivity arguing its uncertain meaning allowed staff to turn down applications they would have to approve under objective standards. See App. L-23. At the same meeting, City Councilor Chizum expressed his fear that objective standards would deprive the city of its ability to say a sign was not "right." See App. L-24.

The First Amended Complaint put forth a total of seventeen claims. Thirteen addressed unconstitutional deprivation of free speech arising out of the enactment and enforcement of the Lake Oswego sign code against the petitioners and others. See App. F. As alleged in the complaint, the challenged code contains various provisions which either directly regulate speech based upon content or viewpoint, and other provisions which attempt to regulate content and/or viewpoint even though they are expressed in a content-neutral way. See App. E.

In September and October of 2003 the parties filed cross motions for summary relief. All but a few claims in the complaint remained at issue. Conflicts in the evidence supported a declaratory order invalidating the entire sign code. A summary of the narrowed claims is found at App. G-1, G-2.

On March 30, 2004, the lower court terminated the controversy between the parties by entering an opinion and order purporting to resolve all claims. See App. B-1, B-35. On April 9, 2004 the plaintiffs timely objected under F.R.Civ.P. 60(b)(4), arguing the city's production of the conflicting evidence over material facts prevented summary relief. See App. H-1, H-2. That request was denied.

Petitioners twice unsuccessfully sought stays to prevent the city from enforcing its ban of pole signs and imposing unconstitutional permitting practices that allowed city officials to impose subjective conditions for approval of the size, conspicuity, visibility, message and copy of any replacement signage. See App. J-1, J-3, J-4. These requests do not appear on the public docket sheet. See App. J-2.

The ban took effect within eight weeks of the district court's March 30, 2004 ruling. See App. E-13. The plaintiffs filed an opening appeals brief in October of 2004 identifying the issues preserved in the district court. See App. K-1 through K-3.

## REASONS FOR GRANTING THE PETITION

This petition seeks review of a ruling containing several significant decisions by the Ninth Circuit materially modifying commercial and non-commercial speech protections guaranteed by the First Amendment.

The regulations of on-premise signs contained in the Sign Code are regulations of speech. *City of Ladue v. Gilleo*, 512 U.S. 43 (1994); *see also City of Painesville Building Dept. v. Dworkin & Bernstein Co.*, 733 N.E.2d 1152 (Ohio, 2000). Furthermore, the regulations target no speech of a lesser protected category such as fighting words, obscenity, or incitement. No issues are raised requiring consideration of the regulation of speech on public property, either as a public forum, limited public forum or non-public forum. Petitioners' challenges focus on the ability of the government to restrict private speech on private property including regulation of expression on political signs to commercial signs, and from time and temperature signs, to those supporting the local high school sports team.

The question of how the First Amendment applies to on-premise[1] signs is one of growing importance in this country. *See, e.g., La Tour v. City of Fayetteville,* 442 F.3d 1094 (8th Cir. 2006) (reviewing a regulation of electronic message signs); and *Solantic, LLC v. City of Neptune Beach,* 410 F.3d 1250 (11th Cir. 2005) (reviewing a sign code challenged as being content based). Lake Oswego is one of many cities that are becoming increasingly aggressive in avoiding compliance with existing limits on their municipal power to regulate speech. The Court of Appeals' new changes in standards for regulating on-premise signs are inconsistent with Supreme Court precedent and the law of other federal circuits. They significantly reduce First Amendment protections, and ratify Lake Oswego's history of doing the same thing. These developments raise issues of national importance regarding how the First Amendment should be interpreted.

All five questions presented address the important changes in First Amendment law that petitioners believe significantly depart from established precedent, and conflict with rulings of other circuits and the Supreme Court and/or depart sufficiently from the accepted and usual course of judicial proceedings so as to require the exercise of the Supreme Court's supervisory powers.

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[1] As opposed to Billboards, or "off-premise" signs. *See Metromedia v. City of San Diego,* 453 U.S. 490, 501, 507-508 (1981).

**1. Without review, the government may impose new viewpoint based regulations on speech without complying with strict scrutiny by claiming they have an incidental effect upon speech. [The "di minimus" exception allowing viewpoint discrimination].**

For regulations of speech, the first inquiry is whether the regulations are content or viewpoint based. *City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring). A regulation is viewpoint based if it treats speech differently depending upon the identity of the speaker, or the position the speaker takes in a discussion. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

In *City of Ladue*, Justice O'Connor opined:

> [I]t is quite true that regulations are occasionally struck down because of their content-based nature, even though common sense may suggest that they are entirely reasonable. But though our rule has flaws, it has substantial merit as well. *It is a rule, in an area where fairly precise rules are better than more discretionary and more subjective balancing tests.* On a theoretical level, it reflects important insights into the meaning of the free speech principle – for instance, that content-based restrictions are especially to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government to distort public debate. On a practical level, it has in application led to seemingly sensible results.

512 U.S. at 50 (O'Connor, J., concurring) (internal citations omitted) (emphasis supplied).

The Ninth Circuit's approach, however, was to apply, essentially, rational basis review to viewpoint based regulations of signs on the belief that exemption from the requirements of obtaining a permit and going through design review has only "incidental effects" upon speech. See App. A-20 through A-23. This new "di minimus" exception to strict scrutiny creates serious uncertainty in an area of law that demands certainty.

The Ninth Circuit changes raise immediate important censorship issues over what constitutes an "incidental effect" upon speech and of how far a city can go to give preferential treatment to particular speakers before it has enacted a viewpoint based regulation normally subject to strict scrutiny. Whether the application of that standard should continue to apply to all viewpoint based regulations of speech or whether a new exemption lacking standards for its even application should be added,[2] is a decision that should be made by the Supreme Court instead of a federal Court of Appeals.

The Court of Appeals' newly invented "di minimus" exception to identity based regulation was imitated recently by the Eighth Circuit that created its own new content based "di minimus" exception. It turned away from precedent by allowing a city to continue to allow time and temperature signs but ban electronic message centers although the admitted distinction was based on the content of the expression. *See La Tour, supra.*

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[2] Although exemptions to the content based standard have been carved out for fighting words, obscenity, and incitement, no such exemptions exist for viewpoint based regulations of speech. *R.A.V.*, 505 U.S. at 383 (explaining that these categories of speech are not entirely unprotected).

**2. The sign code fails to comply with the Time, Place and Manner test under the First Amendment or the lesser standard applied to commercial speech due to a city's failure to present sufficient, uncontradicted evidence of compliance.**

In addition to challenging portions of the sign code as content and viewpoint based regulations of speech, plaintiffs challenged the vast majority of the sign code as unconstitutional under the Time, Place and Manner ("TPM") Test and the commercial speech test. See App. F-20, F-21, F-23. As to TPM compliance in *Turner Broadcasting v. Federal Communications Comm.*, 512 U.S. 622 (1994), the Court explained: a content-neutral regulation will be sustained if it: 1) furthers an important or substantial governmental interest; 2) if the governmental interest is unrelated to the suppression of free expression; and 3) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *Turner*, 512 U.S. at 662. The commercial speech standard is similar except that some content based regulation is allowed in schemes that target lawful, non-misleading commercial speech. *Central Hudson Gas and Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

The district court relied upon "aesthetics" and "traffic safety" put forth in § 47.01.030 of the sign code to meet the relevant governmental interest standard. Conflicting evidence addressed in Section 5 below reveals Lake Oswego did not rely upon or consider this code section as a government interest supporting the ban on petitioners' signs as stated by the district court. A threshold requirement of both *Turner* and *Central Hudson* has been modified by the first federal appeals court to accept officials'

aesthetic preferences as sufficient justification for regulating the expression on municipal on-premise signs.

But aesthetics, even a community's real aesthetic values, is usually not an appropriate interest justifying a restriction of speech. *See Schneider v. State*, 308 U.S. 147, 163 (1939) (stating, " . . . the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution."). In *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 791 (1988), the Supreme Court stated, "the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government." Similarly, the Supreme Court in *Cohen v. California*, 403 U.S. at 25 (1971) stated, " . . . it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *See also Ovadal v. City of Madison*, 416 F.3d 531, 537 (7th Cir. 2005) (explaining that restricting speech because of the way listener's will respond, or that the speech is offensive to some, is not a content-neutral restriction of speech).

A famous statement forbidding reliance on officials' personal aesthetics was made by Justice Jackson in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to

confess by word or act their faith therein."[3] Aesthetics applied in the instant case, is nothing more than imposing one public official's opinion of beauty on private speakers and their audiences. As admitted in the council meeting minutes, the purpose of the sign code is to issue permits only for those signs that "look right" to individual officials, not the public. See App. L-23, L-24.

The City record, and the Ninth Circuit Opinion, consistently point out that the primary reason for regulating on-premise signs – and only reason that concerned the City – was officials' aesthetics. In this case they admittedly vary from one official to another. The only cases where aesthetics is viewed as a substantial governmental interest is in the realm of off-premise signs and billboards. *Metromedia v. City of San Diego*, 453 U.S. 490, 501, 507-508 (1981).

In *Metromedia*, the plurality adopted its aesthetics analysis from prior takings cases and land use cases – not speech cases. Even so, there was concern with aesthetics as a justification for regulating speech even though the parties stipulated it was an appropriate interest for regulating *billboards*. Indeed, aesthetic judgments are subjective by nature and thus, inherently suspect "and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose." *Metromedia*, 453 U.S. at 510 (Plurality Opinion); *See also Metromedia*, 453 U.S. at 530 (Brennan J., concurring in the judgment) ("I think that the city has failed to show that its asserted interest in aesthetics is sufficiently substantial. . . ."). Although the particular aspects of

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[3] *See also Texas v. Johnson*, 491 U.S. 397 (1989).

billboards and an agreement by the parties may have justified this approach in *Metromedia*, there is no evidence put forward by the City suggesting that on-premise signs are so similar as to justify using aesthetics to regulate them. Lake Oswego seems to have forgotten that the aesthetics and traffic safety interests both sides agreed were governmental purposes for restricting billboard speech in *Metromedia* were rejected as purposes for restricting on-premise signs by the same parties.

We have a long-standing history of the majority attempting to control the expression of the minority in this country. The purpose behind the First Amendment, is to protect those whose speech we disagree with, whose tastes or opinions we find distasteful or "ugly." Whether the personal aesthetic values of officials' is a significant governmental interest sufficient to deny speech officials do not consider tasteful or beautiful, is an issue of significant importance and needs to be clarified in the realm of on-premise signs.

Another related question under the TPM and commercial speech tests is whether a regulator produces real and persuasive evidence to satisfy its burden of proof under *Central Hudson* and/or *Turner*.

> When a city defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." *Quincy Cable TV, Inc. v. FCC*, 248 U.S. App. D.C. 1, 768 F.2d 1434, 1455 (CADC 1985). It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way. See *Edenfield v. Fane*, 507 U.S. 761,

> 123 L. Ed. 2d 543, 113 S.Ct. 1792 (1993); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. at 496 ("This Court may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity") (internal quotation marks omitted); *Home Box Office, Inc. v. FCC*, 185 U.S. App. D.C. 142, 567 F.2d 9, 36 (CADC 1977) ("[A] 'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist'") (citation omitted).

*Turner*, 512 U.S. at 664-668.

Although the district court cited aesthetics and traffic safety as the sole governmental interests supporting the Lake Oswego Sign Code, the record produced by the City, and cited to by the Ninth Circuit,[4] is devoid of evidence that the banned signs implicate traffic safety, even though the records indicate that various individuals offered information to the city showing that reducing their size and making them hard to read by passing motorists was the sole safety issue. The evidence put forth regarding aesthetics consists of comments of a few officials expressing their personal opinions that the entire medium of pole signs is ugly regardless of what is on them, excepting, of course, government messages and other messages by certain speakers that city officials like. There is no indication that any community wide polling took place or that the aesthetic opinions belong to anyone outside the city planning department. Even if there was a city-wide poll, it

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[4] The Ninth Circuit notes the existence of numerous documents, however, one of those documents – the Urban Land Use publication – was never produced by the City nor made part of this record.

would only show that the city was engaged in the prohibited practice of restricting the expression of a minority in favor of the whims (in this case relating to beauty) of the majority (in this case of planning officials).

Likewise, the City produced no evidence showing how the sign regulations would achieve the stated interests in traffic safety. Common-sense and current research indicate that taller signs – such as pole signs – provide drivers with more reaction time and are thus safer than the shorter signs allowed by the code.

Regulators' failure to produce TPM or *Central Hudson* compliance evidence in other circuits and before the Supreme Court, has routinely caused the courts to void regulations of speech under either TPM or *Central Hudson*. *See Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993); *Seung Chun Lim v. City of Long Beach*, 217 F.3d 1050, 1054 (9th Cir.), *cert. denied*, 531 U.S. 1191 (2001); *Phillips v. Borough of Keyport*, 107 F.3d 164, 173 (3rd Cir.), *cert. denied*, 118 S.Ct. 336 (1997); *Pearson v. Edgar*, 153 F.3d 397, 405 (7th Cir. 1998); *Dills v. City of Marietta*, 674 F.2d 1377, 1382 (11th Cir. 1982) (holding that where evidence does not show that the ordinance will achieve the purposes for its enactment, the ordinance is not constitutional under the First Amendment). The Ninth Circuit's favorable ruling for Lake Oswego in the face of inadequate proof speech is being regulated to serve a real and substantial or significant government interest in this case conflicts with the circuit's own precedents, other circuits and other Supreme Court precedent, and therefore warrants review.

### 3. The Ninth Circuit improperly exempted content based permitting regulations of speech directed at speech occurring on private property and made by private persons, from incorporating procedural safeguards required by *Freedman v. Maryland.*

A system of prior restraints exists where the speaker must obtain the government's permission prior to speaking. *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 553-58 (1975). There are two types of prior restraint protections provided for private speech on private property.

The first is a protection from public officials using unbridled discretion to administer a permit scheme. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969). The second requires incorporation of procedural safeguards into the permitting scheme. *Freedman v. Maryland*, 380 U.S. 51 (1965). The incorporated safeguards require that a Municipality must: 1) bear the burden of initiating a judicial proceeding in the face of a constitutional challenge; 2) bear the burden of persuasion at the judicial proceeding by introducing real evidence of compliance with the relevant speech standard; 3) limit any restraint prior to the judicial determination to a specified brief period of time; and 4) guarantee a prompt judicial determination reviewing the propriety of the denial. *Freedman*, 380 U.S. 51, 62 (1965).

The requirement to incorporate *Freedman* protections in regulations targeting private speech in private forums and the long-standing exemption from the requirement in public forums was recently affirmed in *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322 (2002). There, the Supreme Court restated its unchanged policy that *Freedman* protections are not required where the regulations are *both*

content-neutral and may affect speech in a public forum, and where the record shows content and identity neutral application of permitting schemes whose standards are designed to protect the safety of the public and preserve the physical integrity of public forums where people incidentally assemble and speak. *Id.* The Ninth Circuit's ruling ignored the different public policy considerations supporting the public forum exemption, and expanded it to apply to private property and to content and viewpoint based speech regulations, in order to defeat censorship protections intended to serve entirely different policy considerations.

Such a significant, unprecedented and inconsistent expansion of *Thomas* is an important federal issue that should be settled by the Supreme Court. Elimination of the *Freedman* protection requirements in permitting schemes regulating municipal on-premise signs displaying commercial and non-commercial expression is a question relevant to every community in the country with a sign code. Without these safeguards, cities have new powers to censor, that remain unsupported by policies for exempting public forums. This is yet again another area of law destabilized by the Ninth Circuit and needs clear guidelines for all involved, before it begins to destabilize First Amendment law in the rest of the circuits.

**4. The lower courts improperly authorized a city to continue to employ a subjective design review clause controlling permit approval that is unconstitutionally vague.**

A regulation can be struck down for vagueness for one of two reasons: 1) failure to ensure fair notice to citizens; 2) failure to provide standards for law enforcement.

*Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *United States v. Hausmann*, 345 F.3d 952, 958 (7th Cir. 2003). In order to ensure fair notice, the regulation cannot allow the "enforcement of a law that contains 'terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Gresham v. Peterson*, 225 F.3d 899, 907 (7th Cir. 2000) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984)).

A second important goal served by the policy against vague ordinances is to ensure that a law does not "impermissibly [delegate] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). In cases where the regulations impact protected speech, even greater precision is required. *Haynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (explaining that, if an ordinance "interferes with the right of free speech . . . , a more stringent vagueness test should apply.").

The City of Lake Oswego deliberately agreed to keep its DRC vague, in order to promote an official policy of delegating unbridled discretion to individual sign permitting officials allowing them to resolve sign permit applications on an ad hoc and subjective basis. See App. L-23, L-24. This fact was further explained in a follow-up case in the Lake Oswego municipal court. In the summer of 2005, another pole sign owner, Darryl Eddy was tried for ordinance violations for failing to remove a banned pole sign. While the record was not incorporated in the district court or appeals court proceedings, the undersigned counsel appeared as defense counsel when Hamid Pishvaie, one of

the senior planners, explained to the municipal judge that although the sign code set forth size limits on signs, those sign limits were rarely approved. He affirmed that planners use the DRC as a basis to re-design signs presented for a permit to make them smaller and comport more with the individual planner's tastes. Mr. Eddy could offer substantial clarification of the city's arbitrary permitting practices through an amicus brief if review is granted.

The Ninth Circuit's decision to allow Lake Oswego to continue to impose admittedly subjective permitting standards violates the vagueness doctrine. The city's practice conflicts with other circuits, and prior decisions of this court cited above, and further destabilizes protections for commercial and non-commercial speakers who communicate through on-premise signs in municipalities located in this circuit.

**5. The district court improperly resolved, and the Ninth Circuit Court of Appeals improperly ratified, conflicts in evidence of material fact necessary to support a summary ruling in favor of Lake Oswego, thereby creating and affirming entry of a void judgment chilling protected speech and which must be vacated.**

Certain conflicts in evidence presented by Lake Oswego present the question of whether the district court judgment is a void exercise of jurisdiction. While the Court may alternatively address this issue under its powers to issue extraordinary writs in aid of its jurisdiction under 28 U.S.C. § 1651 and Supreme Court Rule 20, the history of the Court's decisions shows that such writs rarely issue. Supreme Court Rule 10(a) allows alternative discretionary review of this kind of issue where the decisions of lower

courts depart sufficiently from the accepted and usual course of judicial proceedings to warrant the Court's supervision. The lower court's entry of summary judgment in the face of compelling evidentiary conflicts over genuine issues of material fact is the type of act that warrants this Court's supervision.

The lower court ruling grants summary judgment of dismissal on all 17 of petitioners' civil rights claims. See App. B-35. At the beginning of the case, petitioners timely requested a jury. See App. I, p. 1 As the time for trial approached, the district court summarily resolved conflicting evidence over material facts to support judgment for the city. See App. B. A discussion of that evidence is excluded from consideration or comment in either lower court opinion.

The district court found that a few of the challenged ordinances restricting commercial and non-commercial speech were content-based, but nonetheless found the code content-neutral. See App. B-17 through B-21. It also found that the city's code survived commercial and non-commercial speech challenges under intermediate standards of review put forth in *Central Hudson* and *Turner Broadcasting*. *Id*. The court denied a challenge to the city's compliance with limitations on its power to ban a traditional medium of speech, although the city produced no evidence that it carefully calculated the cost of its restrictions on the affected speakers, as addressed in *City of LaDue v. Gilleo, supra*.

The district court also denied petitioners' summary judgment challenge that was based on evidence obtained through discovery, and that cited the city's admitted official custom and practice of employing subjective

permitting standards in a subjective manner to censor protected speech in violation of the prior restraint law of *Freedman, supra.*

The city's conflicting evidence also supported petitioners' third party facial challenges. Small but important parts of the record omitted from either courts' analyses, contain the material evidence from which a jury could conclude the city failed to comply with intermediate standards that apply to commercial speech and time, place and manner regulation when it banned petitioners' speech. To reach and sustain judgment, each lower court had to disregard its own duty to comply with the portion of F.R.Civ.P. Rule 56 that deprives federal district courts of jurisdiction to grant summary relief where there are *genuine disputes over issues of material fact* that remain to be resolved by the jury. See Appendix B-5.

For two decades controlling U.S. Supreme Court law has prohibited judges from making credibility determinations, weighing evidence and drawing legitimate inferences to resolve conflicts in evidence over material facts necessary to support summary judgment, where a jury trial has been requested. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) citing *Adickes*, 398 U.S., at 158-159. The Ninth Circuit rule before this case was: "When the evidence yields conflicting inferences, summary judgment is improper and the action must proceed to trial." *O'Connor v. Boeing N. Am.*, 311 F.3d 1139, 1149 (9th Cir. 2002). As Appeals Panel Member Judge Gould commented in his opinion in another important First Amendment ruling last year, "We, of course, are not empowered to make factual determinations when faced with conflicting evidence . . . " *Menotti v. City of Seattle*, 409 F.3d 1113, 1150 (2005).

The Supreme Court's rule on *materiality* of facts in this context is that "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment," *Anderson*, at 247, 248. (emphasis supplied) The Supreme Court determines the genuineness of a dispute by the content of the evidence and "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* (emphasis supplied).

Stated simply, where as here, there is conflicting evidence in the record that might affect the outcome of the suit and that evidence would allow a reasonable jury to obtain a verdict for the nonmoving party, summary judgment is prohibited.

Three seminal, genuine issues of material fact are caused by conflicting evidence – whether the city's purposes are real and are constitutional; whether the city delegates unbridled discretion to its employees by allowing them to rely upon subjective criteria in deciding whether to issue a sign permit; and whether the standards of the Sign Code's design review clause applied in the permitting process are unconstitutionally vague so that each time a permit is applied for, a First Amendment violation occurs.

The suit was filed in August of 2002. The City produced a selective and limited number of city records of its legislative history. It answered interrogatories in April of 2003. It responded to a request to identify all documents that it or its agents considered or reviewed in deliberating or drafting the revisions of the sign ordinance several times over the past 15 years, by revealing it could not

comply because the ordinance drafting files were not kept by the city attorney. See App. M-1, M-4.

A city memo predating passage of the 1994 Sign Code identified "Citizen Involvement" as one of the goals to be met in the legislative process. See App. L-3, L-4, L-6. However the input that citizens provided was ignored. For example, on October 5, 1993, Jerry Weaver testified that the City's proposed restriction of window signs would render their advertising ineffective. See App. L-13. At the same meeting Mike Carrolley of the Oregon Electric Sign Association "OESA" urged the Council not to vote on the sign code until the association he belonged to could work with the city on it. See App. L-15. Also at that meeting Don Brenamin, a member of the OESA said OESA would have been happy to give input on the effects of changing the sign code but was not notified until recently. See App. L-11, L-12.

He warned city officials of several problems their proposed restrictions could create for businesses. *Id.* Greg Stewart of Mailboxes, Etc. expressed his concern over the council's lack of consultation with OESA and said the sign code was unclear and confusing. See App. L-12, L-13. A city planner said in a private session that the staff did not work with the sign industry people because the revisions were intended to be very few and to address primarily concerns in the Kruseway corridor and to make the code appear constitutional. See App. L-15. Later, Councilor Anderson moved for approval of the draft and the motion passed. See App. L-16, L-17. Consideration of public input relevant to the reasonableness of the city's regulatory alternatives was tabled.

The city produced little evidence of its legislative history between the 1994 and 2000 code revisions. One document dated April 9, 1998 advised another city government, "If you have to read the sign to regulate it, the regulation is content-based and therefore unconstitutional." See App. L-19, L-20. Code Enforcement Officer Ingalls admitted in her deposition that she had to read the GK Travel sign to know whether to cite GK Travel. See App. N-2 through N-8. Both lower courts failed to correctly apply this admission.

As the City again started revising the sign code in 1999, it produced conflicting evidence over the actual interests served by the code.

> "Council President Rhode spoke to removing the subjective review section from the sign code. He said that business people have told him that they needed a sign code with a basic criteria to which they could adhere. He stated that they found this subjective review clause requiring signs compatible with other nearby signs, elements of street, site furniture, and adjacent structures to be one of the biggest problems with the code. He commented that it would be easier for a business person to let the Planning Department design the sign." See App. L-23.

> "Mr. Coffee (Planning Director and assistant city manager) discussed the difficulty of legislating aesthetics and design. He pointed out that, even with specific standards, someone would come in with something that met the standards but still did not look right. He argued that, without the subjective review clause, staff had no ability to turn down any sign that ostensibly

> met the standard. He mentioned the tension between aesthetic quality and certainty." *Id.*
>
> "Councilor Chizum reiterated his concern with rewriting the code. He argued that removing the subjective review clause simply opened up another problem. He held that the City needed the ability to say that a sign was not "right". He mentioned the appeal process for those who disagreed." See App. L-24.
>
> "The Council agreed that staff would bring the issue back before the full Council at another study session." *Id.*

The city uses the word "subjective." The Council permanently tabled this issue. The DRC was never changed. At that same meeting, Council President Rhode materially contradicted Councilor Chizum's conclusion that business people wrote the sign code. See App. L-25. That conclusion is consonant with the city's rejection of businesses' input in 1993 before the 1994 code revisions were passed, and the admitted disconnect between businesses and city officials over what an "effective sign" is.

> "Council President Rhode spoke to removing the phrase 'to improve the effectiveness of signs' from the purpose section of the code. He argued that people interpreted what that phrase meant in different ways. He commented that business people saw a flashing neon sign as more effective than a monument sign. He contended that having a goal of improving the effectiveness of signs meant doing whatever a business person wanted because he/she was the ultimate determiner of what was most effective for his/her business." See App. L-23.

President Rhode seemed to be looking for a way to make the code appear facially content-neutral while continuing to allow planning officials to enforce it illegally. Knowing what was effective was key to knowing whether the signage allowed to replace banned pole signs was a reasonable alternative under *Central Hudson* or *Turner.* The 75% reduction in visibility imposed by the ban suggested it was not. This city purposely disregarded input from those who would be in the best position to know what was reasonable, and made no other effort to find the real answer to the constitutional question of the reasonableness of alternatives.

The Ninth Circuit Court of Appeals ratified the district court's disregard of conflicting evidence which proved that the city's substantial government interests put forth in its "purposes" clause were neither considered nor relied upon during the legislative deliberations, and disavowed both in its official records and by the testimony of its corporate representative. During the September 1999 meeting, it became clear why the dispute over what an effective sign meant was disingenuous as were the other stated statutory "purposes" contained in LOC 47.01.030.

"Mr. Coffee (assistant City Manager and Planning Director) said that *staff did not consider* the *purpose section* as part of the regulations in the ordinance. Mr. Powell (current City Attorney) also agreed that the purpose statement had little practical effect." See App. L-24. City Manager Schmitz was present as well and made no effort to correct these statements. See App. L-21, caption.

Moreover, the City's 1993 official documents identify entirely different and conflicting purposes for the code

revision, such as to "get rid of the unconstitutional language" and to honor a settlement agreement with a developer whereby the developer wrote its own sign code for an annexed property in exchange for dropping opposition to the annexation. See App. L-3, L-4.

Plaintiffs also noted to the lower courts that the "purpose" section of the 1993 code was carried over from an earlier almost identical 1985 code section and not discussed in any city records. See App. L-8. City Manager Schmitz' 2003 summary judgment affidavit, incorporates official documents containing the admissions discussed above. There, Schmitz admits that the 1985 code was unconstitutional. App. O-2. Schmitz never mentions the city's reliance on the "purposes section" for good reason. See App. O-1 through O-11.

In September, 2003, Schmitz was deposed as a F.R.Civ.P. Rule 30(b)(6) corporate representative. Through him, the city admitted it was unaware that the purpose section of the code had ever been applied by city staff. See App. P-4. This admission is consistent with the City's other admissions that the purpose of its admittedly subjective Design Review Claus is to allow its permitting employees to veto or deny sign permits to any applicant whose sign does not look right, even if another employee decided it complies with the same subjective DRC standards.

During a meeting on May 2, 2000, the Mayor commented about major community dissatisfaction with the sign code and recommended grandfathering 67 poles signs the city had banned. See App. L-27. In response to a suggestion that the City loosen the restrictions on pole signs, Councilman Chizum opposed this idea because he

believed that allowing pole signs "would keep the City from achieving *the look city officials wanted.*" *Id.*

He reported a businessman said most business people were unaware of the Sign Code. See App. L-28. Councilor McPeak said business people she talked to thought the Sign Code went way beyond restrictions imposed by other cities. *Id.* Councilman Lowery attempted to justify the ban on pole signs implying that the City spent too much time developing its ordinances and should not have to change the law when a few people complained. *Id.*

In July of 2000 more public input was ignored including a petition signed by the owner and majority of tenants at an office building subject to the code. They contested the ban on pole signs, noting that the use of this medium went back 25 to 30 years. See App. L-31. Testimony by a local merchant that 43 of 67 businesses with non-conforming pole signs wanted the Council to stay with its original decision to grandfather in the pole signs was ignored. *Id.* Another merchant testified that his pole sign has been in place for over 30 years and questioned why a sign that has been up for 30 years was all of a sudden illegal. He indicated that going to a monument sign would cost him $10,000 plus because he had to tear up the parking lot to install the electrical lines to a monument sign. See App. L-32, L-33. He mentioned that a monument sign would also block the sightlines of vehicles leaving his business. *Id.* His comments were ignored.

During Schmitz' deposition the 30(b)(6) representative was asked about the subjectivity in the design review clause. ("DRC") See App. P-1, P-2, P-3. He first admitted that there could be some disagreement among officials

on whether or not a proposed sign is compatible as determined by the relationships of the elements of form, proportion, scale, color, materials, surface treatment, etc. See App. P-3.

He next admitted there could be disagreement among officials over whether a proposed sign met the code requirements and was compatible with the "streetscape" where it was to be placed, including light poles, benches, trash cans, bike racks and landscaping. *Id.* The City was directed to the DRC section providing that "Copies of signs visible from streets shall be designed to reduce distractions to motorists. Signs may be reviewed for clarity and readability." *Id.* When asked whether clarity meant clear to the eye or clear to the reader who is trying to read it or both, the City admitted additional ambiguity by saying it could be both. *Id.*

The discussions found in the city's legislative history do not focus on the least restrictive means of regulation or studying whether there are ample alternatives for banned pole signs. They reveal instead the dissension and dissatisfaction of affected businesses with the city's decision to keep its design review clause subjective in both content and administration, and to ban a traditional medium of expression without careful consideration of the ban's impact on protected speech.

The lower courts' decisions are void exercises of judicial power under these circumstances, because these conflicts in evidence were to be presented to a jury whose role it was to determine which evidence to believe. The conflicting evidence over the *real* purposes has to be resolved before other prongs of *Turner* or *Central Hudson* are considered. There also remains the jury question of the

sufficiency of the city's proof of compliance with the remaining prongs of *Central Hudson* and *Turner*. Faced with this evidence, both lower courts chose to ignore *Lorrilard Tobacco v. O'Reilly*, 533 U.S. 525, 555 (2001) ("government must demonstrate that; 1) the harms recited are real"); *Edenfield v. Fane*, 507 U.S. 762, 770-771 (1993) (Although *Central Hudson* "does not permit us to supplant the precise interests put forward by the State with other suppositions . . . neither will we turn away if it appears that the stated interests are not the actual interests served by the restriction"), and *Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir. 1998) ("Although we must consider the City's limiting construction of the ordinance, we are not required to insert missing terms into the statute or adopt an interpretation precluded by the plain language of the ordinance"). The lower courts clearly exceeded these limitations to support incorrect rulings.

The City's admission that it employs and preserves subjective regulatory standards because objective standards would prevent its employees from denying permits if they think a proposed sign does not "look right" is an admitted policy of enforcing a law that contains terms so vague that persons of common intelligence must guess at its meaning and differ as to its application. As stated above, a regulation is unconstitutionally vague under these circumstances as a matter of law. *Gresham, supra* at 907.

Material conflicts in the evidence were identified by petitioners to both courts. The district court improperly resolved the conflicts, and excluded discussion of the presence of the conflicts. The Court of Appeals followed suit.

Ruling without discussing or analyzing conflicting evidence in the record that prevents entry of a summary

judgment is a departure from normal and accepted judicial administration of summary judgment procedures that required the Ninth Circuit to exercise supervisory powers to void the district court judgment. The Court of Appeals decision to ratify the judgment, particularly where highly valued interests arising under the First Amendment were involved is a substantial departure from federal appeals procedures that justifies the exercise of the Supreme Court's supervisory powers to uphold the First Amendment for an entire Federal Circuit, and prevent further erosion of speech protections in other jurisdictions by vacating the judgments below.

In the months that have passed since the U.S. Court of Appeals avoided acknowledging the problems with the evidence in this case, petitioners have already become aware that a state trial court in New Hampshire was so confused by the Court of Appeals Opinion, that it mistakenly concluded petitioners' challenges did not include a claim the city failed to present evidence of *Central Hudson* compliance. The new erosion of First Amendment protections created by the Ninth Circuit Court of Appeals is already growing.

Petitioners urge the Court to vacate the lower court rulings and enforce their right to a jury trial as appropriate, and to restore the protections the Court has created to preserve their constitutional right of free expression.

Respectfully submitted,

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TABLE OF CONTENTS

Page

Appendix A Ninth Circuit Opinion ..... A-1

Appendix B District Court Opinion ..... B-1

Appendix C Order Denying Rehearing ..... C-1

Appendix D First Amendment Reproduction ..... D-1

Appendix E Lake Oswego Sign Code ..... E-1

Appendix F First Amended Complaint ..... F-1

Appendix G Petitioner's Description of Summary Judgment Claims Presented to District Court ..... G-1

Appendix H Face Page and Page 8 of Petitioners' F.R.Civ.P. Rule 60(b)(4) Request to Vacate Opinion ..... H-1

Appendix I Relevant Excerpts from District Court Docket Sheet ..... I-1

Appendix J

Face Page of Petitioners' 1st Request for Stay ..... J-1

9th Circuit Docket Sheet ..... J-1

Face Page of Petitioners' 2nd Request for Stay ..... J-3

Portion of Page 17 of 2nd Request for Stay ..... J-4

Appendix K 9th Circuit Issues Raised in Petitioners ..... K-1

Appendix L Excerpts of Public Meeting Documents Offered as Record in District and Appeals Courts

Public Hearing Agenda February 1993 ..... L-2

January 1993 Memorandum ..... L-3

"Purposes Section" of 1985 Sign Code ..... L-7

October 1993 City Council Minutes ..... L-9

Additional October 1993 City Council Minutes ..... L-10

TABLE OF CONTENTS – Continued

Page

Former Lake Oswego City Attorney 1998 Memo .....L-19

Excerpts of September 1999 City Council Meeting .....L-21

Excerpts of May 2000 City Council Meeting Minutes.....L-26

Excerpts of July 2000 City Council Meeting Minutes.....L-30

Appendix M Lake Oswego Response to Petitioners Second Set of Interrogatories.....M-1

Appendix N Excerpts of Lake Oswego Code Enforcement Officer Ingalls' Deposition.....N-1

Appendix O Lake Oswego City Manager Schmitz' Affidavit.....O-1

Appendix P Excerpts of Schmitz' Deposition.....P-1

# APPENDIX A

436 F.3d 1064

United States Court of Appeals, Ninth Circuit.
G.K. LTD. TRAVEL, an Oregon corporation; WH Gillison; Ramsay Signs, Inc., an Oregon corporation; Kathleen Kusudo, Plaintiffs-Appellants,
v.
CITY OF LAKE OSWEGO; Sandy Ingalls, Defendants-Appellees.
**No. 04-35416.**

Argued and Submitted Sept. 15, 2005.
Filed Jan. 26, 2006.

John F. Winston (argued), Sherwood, OR, and Douglas M. Bragg, Tualatin, OR, for the plaintiffs-appellants.

Timothy J. Sercombe (argued) and Carra L. Sahler, Preston, Gates & Ellis, LLP, Portland, OR, for the defendants-appellees.

Appeal from the United States District Court for the District of Oregon; Garr M. King, District Judge, Presiding. D.C. No. CV-02-01147-GMK.

Before: FISHER, GOULD and BEA, Circuit Judges.

FISHER, Circuit Judge:

Plaintiffs-appellants ("plaintiffs") are the owners of a pole sign used to advertise their travel business in the City of Lake Oswego ("City").[1] With the stated purpose to reduce visual blight and protect traffic and traveler safety,

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[1] A pole sign is defined as a "free standing sign erected on one or more supports which are more than 30 inches above the adjacent ground surface." Lake Oswego Sign Code ("LOC") § 47.03.015.

the City has enacted a sign code ordinance ("Sign Code" or "Code") regulating the type, size and design of all signs erected within its borders. The Sign Code prevents plaintiffs from continuing to use their pole sign, because that form of sign is severely restricted. Plaintiffs challenge the constitutionality of the Sign Code, raising multiple as-applied and facial claims. The district court granted summary judgment to the City, in large part, and plaintiffs appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291, and affirm.

## I. Background

### A. Plaintiffs' Pole Sign

Plaintiff Ramsay Signs, Inc. ("Ramsay") owns a 42.5-square-foot pole sign that has been used since 1980 in Lake Oswego. Ramsay leased its pole sign to Journeys! of Lake Oswego ("Journeys!") in 1996 for the purpose of advertising the Journeys! travel business. In February 2001, plaintiff G.K. Ltd. Travel ("G.K.") purchased Journeys! along with the pole sign lease and instructed Ramsay to change the copy of the pole sign to advertise G.K.'s travel business. Ramsay accordingly changed the text on the sign from "Journeys! of Lake Oswego, Formerly Apollo Travel" to "G.K. Ltd. Travel Groups Tours Cruises Complete Travel Services Domestic & International." The City's Code Enforcement Specialist, Sandy Ingalls, notified the plaintiffs that because they were changing the copy on their pole sign as a new business, the sign had to conform with the Sign Code. Conformity, in this case, meant removing the sign altogether because the Sign Code prohibits pole signs in Lake Oswego unless statutorily

defined special circumstances exist, none of which were applicable to plaintiffs. *See* LOC § 47.04.100(1).[2]

Plaintiffs sought and were denied a permit to change their pole sign's text without having to remove the sign itself. The City eventually cited plaintiffs for violating the Sign Code and insisted that plaintiffs remove the pole sign. Plaintiffs then sought a variance for their sign, but this too was denied by the City Planning Director. Plaintiffs appealed the variance denial to the City Development Review Commission and the City Council, both of which affirmed the Planning Director. Plaintiffs then filed suit in federal district court.

Plaintiffs insist that their pole sign is a cheap, effective and significant means of attracting clients and, without the sign, plaintiffs will lose a substantial amount of income. Plaintiffs seek to have the Sign Code declared unconstitutional.

B. The Sign Code

As stated in a memorandum of the City of Lake Oswego's Department of Planning and Development, the Sign Code is the City's response to a State of Oregon instruction to cities and counties to adopt comprehensive

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[2] Section 47.04.100(1) provides,

> A non-conforming sign in all zones other than the EC zone as described and established by the Lake Oswego Zoning Code may be maintained or undergo a change of copy without complying with the requirements of this chapter, with the exception that any change for a new business or use or any changes in a wall sign which is painted on a structure will comply with this chapter at such time as change in copy or alteration occurs.

land use plans with the aim of "encourag[ing] design of public and private facilities and structures which enhance community beauty." *See* Or.Rev.Stat. § 197.175(2)(a). In 1994 the City passed the current version of the Sign Code in order to cure earlier perceived constitutional defects. By regulating all signs in the City, the Sign Code seeks, among other things, to reduce visual clutter, preserve the City's aesthetics and protect traffic and traveler safety. *See* LOC § 47.03.010 ("The City Council finds that to protect the health, safety, property and welfare of the public, to provide the neat, clean, orderly and attractive appearance of the community. . . ."). In developing and amending the Sign Code, the City's Planning Commission conducted public hearings, considered the success other cities had experienced with their own sign codes and reviewed an Urban Land Institute study on signage and communities. Notably, during Council deliberations concerning the Sign Code, businesses presented recommendations to the City, many of which were incorporated.

The Council's consultative process culminated in the current Code, which limits the number and type of signs permitted in the City. The Code lays out specifications for all signs and, importantly for plaintiffs, generally prohibits pole signs. The Code is not triggered for the many preexisting signs in most of the City's zones until a new business or use requires a change in copy of the sign or the sign is altered.[3] LOC § 47.04.100 (the "grandfather

[3] A "change of copy" is defined as "the change of logo and/or message upon the face or faces of a legal sign." LOC § 47.03.015. "Alter" is defined as "[a]ny change to a sign excluding change of copy or maintenance – when there is no change of use, or occupancy or ownership." *Id.*

clause"). However, pole signs had to conform to the Sign Code by May 21, 2004; in other words, almost all pole signs in Lake Oswego were to have been removed by this date. *See G.K. Ltd. Travel v. City of Lake Oswego,* 2004 WL 817142, at *1, 2004 U.S. Dist. LEXIS 6984 at *3 (D.Or. Mar. 29, 2004) (*"G.K. Ltd. Travel I"*). In addition to regulating the dimensions and characteristics of all signs in the City, the Code includes a permit and design review process that requires those seeking to erect a sign to allow City officials to review the sign for readability, clarity and compatibility. LOC §§ 47.10.400, 47.06.200(4), 47.06.200(5). If a permit is denied, the permit-seeker may appeal to the City Development Review Commission and ultimately to the City Council. The Code also contains exemptions from the City's permitting process. If an exemption applies, the sign still must "comply with all provisions and regulations of [the Code]," but a permit is not required prior to installation. LOC §§ 47.06.205, 47.08.300. Specifically, the Code exempts "[p]ublic signs, signs for hospital or emergency services, legal notices, railroad signs and danger signs" from the permitting process. LOC § 47.06.205(4). The Code also exempts temporary signs from the permitting requirement so long as the temporary sign goes up within a specified time period triggered by the occurrence of an enumerated event, such as an election or the sale, lease or rental of property.[4] *See, e.g.,* LOC § 47.08.300(B)(1). Finally, the Code incorporates a variance procedure to ease

[4] Temporary sign is defined as "[a]ny sign, banner, pennant, valance or advertising display constructed of cloth, canvas, light fabric, cardboard, wallboard or other like materials, with or without frames, and any other type sign not permanently attached to the ground, or a structure, intended to be displayed for a short period of time only." LOC § 47.03.015.

the burden of the Code's application in some cases. LOC § 47.12.500.

C. Plaintiffs' Claims

Focusing on the Sign Code's restrictions on pole signs, plaintiffs raise two as-applied challenges to the Code claiming that the Code's size and type limitations and the Code's grandfather clause unconstitutionally regulate plaintiffs' speech on the basis of content. Plaintiffs want these provisions stricken from the Sign Code and suggest that without these provisions, the balance of the Sign Code should be rendered unenforceable. Plaintiffs further claim that the ban on pole signs is an unconstitutional ban on a protected medium of speech as applied to the plaintiffs, because pole signs are "a unique form of communication."

Plaintiffs also attack the Sign Code by way of several facial challenges, asserting that they are entitled to declaratory, injunctive and monetary relief. Plaintiffs argue that the Code, particularly its exemptions from the permitting process, its grandfather clause and its design review process allowing officials to read signs for clarity and readability, represents a facially unconstitutional regulation of noncommercial and commercial speech based on content or viewpoint, or alternatively represents an unreasonable time, place or manner regulation. They also challenge the Code as a facially unconstitutional preference for commercial over noncommercial speech because of the treatment of temporary signs in residential zones. LOC § 47.08.300(B). Finally, plaintiffs claim the permitting scheme (including the design review provision of the

Code), LOC §§ 47.10.400, 47.06.200(4), is an unlawful prior restraint on speech and unconstitutionally vague.[5]

D. District Court Disposition

The district court, in large part, granted summary judgment for the City. In ruling on the content neutrality of the Sign Code, the district court meticulously reviewed provisions of the Code challenged by plaintiffs as content based. The district court determined that the vast majority of the provisions were content neutral, but found that a limited portion of the Code was content based. Specifically, citing *Desert Outdoor Adver. v. City of Moreno Valley,* 103 F.3d 814, 820 (9th Cir.1996), the district court found content based the exemptions from the permit requirements for danger signs, official notices and "no solicitation" signs, LOC §§ 47.06.205(4), 47.06.205(10). It also found content based the allowance, without a permit, of temporary signs in commercial or industrial zones for charitable fundraising events, LOC § 47.08.300(B)(2)(c), because the court found it represented the City's preference for a certain message. The district court ordered these subsections stricken from the Sign Code, but found the Code otherwise constitutional. *G.K. Ltd. Travel I,* 2004 WL 817142, at *8-*9, *15-*16, 2004 U.S. Dist. LEXIS 6984 at *24,*48. The City does not appeal these rulings. The district court also granted summary judgment to the City on the plaintiffs' as-applied claims.

We review de novo the constitutionality of a local ordinance. *See Rui One Corp. v. City of Berkeley,* 371 F.3d

[5] In district court, plaintiffs also raised equal protection and takings arguments. The district court granted summary judgment for the City on these claims and plaintiffs do not appeal.

1137, 1141 (9th Cir.2004). We focus, primarily, on plaintiffs' challenge to the pole sign regulations and plaintiffs' facial challenges to the Sign Code summarized above. More specifically, we address five issues: (1) whether the Sign Code's regulation of pole signs is constitutional; (2) whether the Sign Code otherwise is a constitutional, content-neutral time, place or manner restriction on speech; (3) whether the Sign Code's regulation of temporary signs in residential zones indicates an impermissible preference for commercial over noncommercial speech; (4) whether the Sign Code's permitting scheme is an unconstitutional prior restraint; and (5) whether the Sign Code, and specifically its design review clause allowing City officials to review signs for "compatibility," is unconstitutionally vague. In all respects, we hold the Sign Code a constitutional and permissible government regulation.

## II. Pole Sign Regulation

The Code restricts the availability of pole signs as a carrier of communication in the City. *See, e.g.,* LOC §§ 47.04.100, 47.04.102, 47.10.405(1)(D), 47.10.410(1)(D). However, pole signs are permissible in the City's general commercial zones "when necessary to provide vision clearance at driveways or intersections and when there is no alternative, visible on-building or monument sign location." LOC § 47.10.410(1)(D). Plaintiffs urge that because the Sign Code bans their pole sign, it is an unconstitutional regulation of plaintiffs' speech and that the Code impermissibly bans a protected medium of expression in violation of *City of Ladue v. Gilleo,* 512 U.S. 43, 54, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994) (holding unconstitutional a city's ban on all residential signs, because they are

a "venerable means of communication that is both unique and important").

The "government may impose reasonable restrictions on the time, place, or manner of engaging in protected speech provided that they are adequately justified without reference to the content of the regulated speech." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993) (internal quotation marks and citation omitted). In addition to being justified without reference to content, the restrictions must be "narrowly tailored to serve a significant governmental interest and . . . leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)).

A. Justified Without Reference to Content

To pass muster under *Ward*, the challenged regulation must first be "justified without reference to the content of the regulated speech." *Id.* Our primary concern is determining whether a regulation of speech was adopted out of disagreement with a message sought to be conveyed. "The government's purpose is the controlling consideration." *Id.* However, we need not engage in a searching inquiry of the legislature's motive to determine the government's purpose. Rather, "whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." *Menotti v. City of Seattle*, 409 F.3d 1113, 1129 (9th Cir.2005) (citing *City of Los Angeles v. Alameda*

*Books, Inc.*, 535 U.S. 425, 448, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (Kennedy, J., concurring)) (internal quotation marks omitted).

The pole sign restriction is not a "law[] that by [its] terms distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 643, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). The Code restricts all pole signs across the City's general commercial zones without creating exceptions for preferred content. *Cf. Foti v. City of Menlo Park*, 146 F.3d 629, 636 (9th Cir.1998). The burdens imposed by these pole sign restrictions are borne equally by all of the City's residents. *See Turner Broad. Sys.*, 512 U.S. at 643, 114 S.Ct. 2445. Further, plaintiffs offer no evidence suggesting illicit motive or bias on the part of the City or that the City banned pole signs in general, or their pole sign in particular, because of a desire to stifle certain viewpoints. *See City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984).

Plaintiffs argue that the Code's grandfather clause, LOC § 47.04.100, exempting the City's preexisting signs from compliance with the Sign Code until there has been a change in copy or alteration, is content based because it requires City officers to "read a sign's message to determine if the sign is exempted from the ordinance." *Foti*, 146 F.3d at 636. It is not clear, however, that officers merely examining the face of the sign to determine whether its text or graphics have changed in a technical sense renders the grandfather provision content based. Regardless, at this point, we need not determine whether the grandfather clause as applied to plaintiffs is an unconstitutional content-based regulation of speech, because all pole signs,

including preexisting, grandfathered ones, were to be brought into compliance with the Sign Code's mandates by May 21, 2004. *See G.K. Ltd. Travel I,* 2004 WL 817142, at *1, 2004 U.S. Dist. LEXIS 6984 at *3; LOC § 47.04.100(5). Therefore, the question of the constitutionality of the grandfather clause as applied to pole signs is now moot. *See Clark v. City of Lakewood,* 259 F.3d 996, 1011 (9th Cir.2001) ("[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.") (internal citations omitted).

We conclude that the City's restriction on plaintiffs' pole sign is not a content-based regulation of plaintiffs' speech. We therefore turn to whether the City's interest in regulating pole signs is significant, whether the restriction is narrowly tailored and whether plaintiffs retain ample alternative channels to communicate their message.

B. Significant Government Interest

Content-neutral time, place or manner restrictions must advance a significant government interest in order to be constitutional. *See Ward,* 491 U.S. at 791, 109 S.Ct. 2746. Through the Code's statement of purpose, the City asserts numerous interests in passing its sign regulations, including its pole sign restriction. Section 47.03.010 states:

> The City Council finds that to protect the health, safety, property and welfare of the public, to provide the neat, clean, orderly and attractive appearance of the community, to improve the effectiveness of signs, to provide for safe construction, location, erection, and maintenance of signs, to prevent proliferation of signs and sign clutter, and to minimize adverse visual safety factors to travelers on public highways and on

> private areas open to public travel, it is necessary to regulate [signs]. . . .

Of the justifications for the Sign Code and its restriction on pole signs, the two most prominent are the preservation of the City's aesthetic quality and the protection of travel safety. These are oft-invoked objectives with a rich history of judicial endorsement, and sometimes skepticism. *See Foti,* 146 F.3d at 637 n. 8. Against the backdrop of numerous decisions of the Supreme Court and this court, we do not doubt that Lake Oswego's interests in its appearance and the safety of the public are significant and well established. *See Taxpayers for Vincent,* 466 U.S. at 807, 104 S.Ct. 2118 ("The problem addressed by this ordinance – the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property – constitutes a significant substantive evil within the City's power to prohibit."); *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 507, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) ("Nor can there be substantial doubt that the twin goals that the ordinance seeks to further – traffic safety and the appearance of the city – are substantial governmental goals."); *Foti,* 146 F.3d at 637.

Plaintiffs seem to argue that even if the general interests in preventing visual blight and ensuring travel safety are significant, they are not significant for Lake Oswego because the City has neither established that it has a problem with visual blight or travel safety, nor that the pole sign restriction would actually advance the City's asserted interests.[6] In the absence of such evidence,

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[6] Plaintiffs also argue that the City's willingness to exempt certain, pre-existing signs from the regulations indicates that the City's interests are not substantial. *See* LOC § 47.04.100. However, the City's

(Continued on following page)

plaintiffs contend, the Sign Code is a constitutionally defective means for advancing any governmental interest, significant or otherwise.

These arguments are not convincing. As to whether the City's interests are actually served by the Sign Code, we generally defer to the legislative body passing the law in determining whether the government's ends are advanced by a regulation. *See City of Lakewood,* 259 F.3d at 1015. Further, the Sign Code, including the pole sign restriction, was the result of much legislative deliberation, a dynamic dialogue with the City's residents and businesses and extensive hearings; these conversations, along with Council reliance on the experience of other cities, produced strong evidence of the need for sign restrictions and the form these restrictions should take.[7] This evidence provided the City with legitimate and relevant bases for advancing its Sign Code and restricting the availability of pole signs. *See Lorillard Tobacco v. Reilly,* 533 U.S. 525, 555, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001) ("We have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common

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interests are advanced by substantial reduction in offensive signage even when all such signs are not immediately removed. "We [do not] require that the Government make progress on every front before it can make progress on any front." *United States v. Edge Broad. Co.,* 509 U.S. 418, 434, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993). *See also Moser v. FCC,* 46 F.3d 970, 974 (9th Cir.1995).

[7] At one City public hearing, a resident characterized pole signs as a "visual pollution." Furthermore, a Department of Planning and Development memorandum indicates that businesses "approached the City requesting monument signs to replace pole signs which become less visible as street trees grow taller."

sense.'"); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) ("The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.").

C. Narrowly Tailored

A content-neutral regulation designed to advance significant government interests must be narrowly tailored to be constitutional. Narrow tailoring requires that the regulation actually advance the government's interests, but it need not do so in the least restrictive or least intrusive way. *See State University of New York v. Fox*, 492 U.S. 469, 479, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989); *Ward*, 491 U.S. at 799, 109 S.Ct. 2746. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . , the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800, 109 S.Ct. 2746.

Plaintiffs argue that the restriction on pole signs is not narrowly tailored because it goes further than necessary to achieve the City's interests in aesthetics and traffic safety. We do not agree. The Code permissibly and in a narrowly tailored way limits the prominence of plaintiffs' advertising sign by restricting its length and position. *See Foti*, 146 F.3d at 641 (in holding a sign restriction to be narrowly tailored, we noted "[t]he restrictions on the size

and number of picket signs are reasonable legislative judgments in light of the City's concern for traffic safety."). Because of their height, pole signs, as defined by Lake Oswego, can reasonably be perceived by the City to be aesthetically harmful and distracting to travelers. *See Metromedia,* 453 U.S. at 510, 101 S.Ct. 2882 ("It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm.'"). Severely limiting their presence in Lake Oswego directly serves the City's purposes. *See Taxpayers for Vincent,* 466 U.S. at 808, 104 S.Ct. 2118 ("By banning these signs, the City did no more than eliminate the exact source of the evil it sought to remedy."). The Sign Code's pole sign restriction is a narrowly tailored means of achieving the City's significant interests.

D. Ample Alternative Channels

Even a narrowly tailored content-neutral regulation must not foreclose too many channels of expression; there must be ample alternative opportunities for a speaker to convey his or her message. In our analysis, however, we are cautioned against invalidating government regulations for failing to leave open ample alternative channels unless the regulation foreclose[s] "an entire medium of public expression across the landscape of a particular community or setting." *Colacurcio v. City of Kent,* 163 F.3d 545, 555 (9th Cir.1998) (citing *Metromedia,* 453 U.S. at 525-27, 101 S.Ct. 2882 (Brennan, J., concurring)).

Although it restricts the availability of pole signs in the City, the Code says nothing about other non-sign-based forms of communication such as handbills, radio, television,

newspaper or telemarketing. *See Bland v. Fessler,* 88 F.3d 729, 736 (9th Cir.1996). Even with respect to signage, the Code itself authorizes wall signs, monument signs, awning and canopy signs, blade signs and overhanging signs, allowing plaintiffs a "reasonable opportunity" to communicate their message. *See* LOC §§ 47.03.015, 47.10.412, 47.10.415, 47.10.420; *Menotti,* 409 F.3d at 1141 (citing *City of Renton,* 475 U.S. at 54, 106 S.Ct. 925). In light of these ample alternatives, we cannot invalidate the Sign Code merely because it restricts plaintiffs' preferred method of communication.[8] *See Taxpayers for Vincent,* 466 U.S. at 812, 104 S.Ct. 2118 ("[T]he First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places"); *Kovacs v. Cooper,* 336 U.S. 77, 88-89, 69 S.Ct. 448, 93 L.Ed. 513 (1949) ("That more people may be more easily and cheaply reached by sound trucks . . . is not enough to call forth constitutional protection for what those charged with

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[8] More extensive restrictions banning "a venerable means of communication that is both unique and important" might be unconstitutional. *City of Ladue,* 512 U.S. at 54, 114 S.Ct. 2038. However, plaintiffs do not prove that pole signs occupy such a "venerable" position in Lake Oswego. For example, there is no explanation why plaintiffs consider pole signs to be "unique and important" in Lake Oswego or that monument or on-building signs would not effectively serve plaintiffs' communicative interests. Indeed, other businesses encouraged the City to have monument signs replace pole signs. *See Taxpayers for Vincent,* 466 U.S. at 812, 104 S.Ct. 2118 ("Notwithstanding appellees' general assertions in their brief concerning the utility of political posters, nothing in the findings indicates that the posting of political posters on public property is a uniquely valuable or important mode of communication, or that appellees' ability to communicate effectively is threatened by ever-increasing restrictions on expression."). For this reason, plaintiffs' as-applied challenge to the Sign Code as "banning a medium" also fails.

public welfare reasonably think is a nuisance when easy means of publicity are open.").

In sum, we hold that the Sign Code's pole sign restriction is justified without reference to the content of the regulated speech, is narrowly tailored to achieve the City's significant interests in aesthetics and traffic and traveler safety and, although it forecloses the availability of pole signs, it leaves open ample alternative means of communicating the plaintiffs' advertising message. The City's pole sign restriction, as applied to plaintiffs, is constitutional.

## III. Content Neutrality of the Remaining Provisions of the Sign

Plaintiffs next contend that even if the City may properly regulate and restrict their pole sign, the Code impermissibly infringes on the First Amendment rights of third parties. At the outset we note that plaintiffs need not establish standing prior to bringing this form of facial challenge, which seeks to invalidate the entire ordinance. *See Foti,* 146 F.3d at 635 ("The second type of facial challenge is an exception to our general standing requirements: the plaintiff argues that the statute is written so broadly that it may inhibit the constitutionally protected speech of third parties, even if his own speech may be prohibited. A successful challenge to the facial constitutionality of a law invalidates the law itself.") (internal citations omitted). In evaluating plaintiffs' facial challenge, we apply the same content-neutrality test articulated in *Ward* and addressed more fully above in our discussion of the Code's pole sign restriction.

A. Justified Without Reference to Content

Plaintiffs identify several portions of the Code that they urge us to hold content based. The vast majority of plaintiffs' identified provisions clearly are not content – or viewpoint – based. There is no indication either on the face of the ordinance or in the evidence in the record that the City's purpose in adopting the Sign Code, and its size and type restrictions, was to regulate speech on the basis of content. *See Madsen v. Women's Health Ctr.,* 512 U.S. 753, 763, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994) ("We . . . look to the government's purpose as the threshold consideration."); *see also City of Ladue,* 512 U.S. at 48, 114 S.Ct. 2038 ("It is common ground that governments may regulate the physical characteristics of signs. . . ."); *Foti,* 146 F.3d at 640 ("We have upheld restrictions on the size and aggregate area of signs posted on private property based on a city's interests in aesthetics.") (internal citations omitted).

Although most of the provisions describe the type and dimensions of permissible signs, plaintiffs do identify a few potentially suspect portions of the Code, quoting *Foti,* 146 F.3d at 636, and asserting that "in this circuit a regulation of speech is 'content-based [if] a law enforcement officer must read a sign's message to determine if the sign is[regulated.]'" These possibly content-based provisions are: (1) An exemption from the permit requirement for public signs, hospital or emergency signs, legal notices, railroad signs and danger signs, LOC § 47.06.205(4); and for temporary signs during enumerated events, like elections, LOC § 47.08.300(B)(1)(a) (during elections, residents are exempt from the permit requirements otherwise imposed on temporary signs). (2) One section that grandfathers in old, nonconforming signs but requires

these signs to conform with the regulations when the sign is altered. LOC §§ 47.04.100, 47.04.102.(3) The design review provision (incorporated into the Code's permitting process) that requires City officials to review signs for clarity and readability. LOC § 47.06.200(5). We review each provision below, and hold that neither the Code as a whole nor these provisions in particular regulate speech on the basis of content. Therefore, the Sign Code is content neutral.

1. *Exemptions of Certain Signs from the Permit Requirement*

a. *Speaker-based exemptions*[9]

Section 47.06.205(4) provides, "public signs, signs for hospital or emergency services, legal notices, railroad signs and danger signs" must comply with the Sign Code, but need not be subject to the City's permit and fee process. Plaintiffs insist that the limited exemptions of section 47.06.205(4) render the Sign Code content based because the City is expressing a preference for certain types of speech. We disagree.

The City interprets these provisions as providing exemptions to certain speakers and not to particular content. *See G.K. Ltd. Travel I,* 2004 WL 817142, at *5-*16, 2004 U.S. Dist. LEXIS 6984 at *16; *see also* LOC § 47.03.015 (defining public signs as "a sign erected and

[9] We do not understand plaintiffs as challenging the speaker-based exemptions of LOC § 47.06.205(4) on equal protection grounds. *Cf. Foti,* 146 F.3d at 637-38 (refusing to address whether a picketing and sign ordinance that granted an exemption for government speech violated equal protection because plaintiffs failed to present these arguments to the district court).

maintained by a public agency within the right-of-way of a street or alley"). Like the district court, we hold this construction to be reasonable.[10]

The Supreme Court in *Turner Broad. Sys., Inc. v. FCC* stated

> [S]peaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say). . . . [L]aws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.

512 U.S. at 658, 114 S.Ct. 2445. In this case, the Sign Code reflects the City's preference for not subjecting certain entities – public agencies, hospitals and railroad companies – to the requirements of the permitting and fee scheme.[11] The

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[10] In evaluating § 47.06.205(4) of the Sign Code, the district court found that exempting legal notices and danger signs from the permit and fee requirements of the Code was constitutionally impermissible. The district court reasoned that there are no obvious owners for *legal notices* or *danger signs* (as opposed to hospital or railroad signs) and the City's limiting construction was therefore inapplicable. The court ordered these subsections severed from the ordinance, relying on *Desert Outdoor Adver.* where we concluded that exemptions in a sign ordinance for "official notices" and "warning" signs were content based. *See G.K. Ltd. Travel I*, 2004 WL 817142, at *6, 2004 U.S. Dist. LEXIS 6984 at *18 (citing *Desert Outdoor Adver.*, 103 F.3d at 820). The City has not appealed the district court's ruling and we do not rule on the constitutionality of the severed exemptions.

[11] We have previously questioned the constitutionality of a "wholesale exemption for government speech," but we do not read Lake Oswego's Sign Code to provide such an exemption. *See Foti*, 146 F.3d at 637. Rather, the public agency exemption applies only to the permitting scheme; public agencies are otherwise required to follow the substantive requirements of the Sign Code. *See* LOC § 47.06.205 ("The following signs

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exemptions are purely speaker based according to the City's reasonable construction of the provision and say nothing of the City's preference for the content of these speakers' messages, nor do they allow the City to discriminate against disfavored speech. That is, plaintiffs have not shown that the City preferred the substance of railroad company messages, for instance, over travel agency messages and therefore exempted the railroad companies from the permitting process. *See One World One Family Now v. City & County of Honolulu,* 76 F.3d 1009, 1012 n. 5 (9th Cir.1996) ("Because [the] exemptions don't enable the city to discriminate against ideas it disfavors, they don't render the ordinance content-based."). Moreover, these institutional speakers are still subject to the mandates of the Sign Code concerning the type, number and characteristics of signs that are permissible in the City; it is just that certain speakers need not obtain permits (and pay the associated fee) before posting their signs. That the law affects plaintiffs more than other speakers does not, in itself, make the law content based. *See Ward,* 491 U.S. at 791, 109 S.Ct. 2746 ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.").

b. *Event-based exemptions*

Likewise, the permit exemption for temporary signs in residential zones is not content based. Indeed, the provision

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shall comply with all provisions and regulations of this chapter; However [sic], no fee, permit or application is required."). Furthermore, the exemption here for public signs is more narrowly drawn because the Code exempts only those signs "erected and maintained by a public agency within the right-of-way of a street or alley." LOC § 47.03.015.

creating this exemption explicitly demands content neutrality. *See* LOC § 47.08.300(B)(1) ("In any residential zone temporary signage shall be allowed for each and every lot. This signage *shall not be restricted by content,* but is usually and customarily used to advertise real estate sales, political or ideological positions, garage sales, home construction or remodeling, etc.") (emphasis added). Section 47.08.300(B) imposes only temporal and size restrictions on temporary signs. For example, homeowners may erect a temporary sign concerning any topic whatsoever on their property without a permit so long as that sign goes up not more than 90 days prior to an election, stays up not more than five days following the election and is no larger than six square feet. *See* LOC § 47.08.300(B)(1)(a). Likewise, a homeowner may put up "[o]ne temporary sign not exceeding six square feet provided the sign is removed within fifteen days from the sale, lease or rental of the property or within seven days of completion of any construction or remodeling." LOC § 47.08.300(B)(1)(b). Such exemptions indicate the City's recognition that during certain times, more speech is demanded by the citizenry because of the event (e.g., a real estate transaction or election) but the City does not limit the substance of this speech in any way. The exemption for temporary signs does not manifest the City's desire to prefer certain types of speech or regulate signage by its content. Therefore, this exemption, too, is content neutral.

Neither the speaker – nor event-based exemptions implicate *Foti* insofar as neither requires law enforcement officers to "read a sign's message to determine if the sign is exempted from the ordinance." *Foti,* 146 F.3d at 636. In the speaker category, officers decide whether an exemption applies by identifying the entity speaking through the sign

without regard for the actual substance of the message. In the case of event-based exemptions to the permitting process, the officer must determine only whether a specific triggering event has occurred and if the temporary sign has been erected within the specified time frame. Plainly, the City anticipates that signs will relate to the triggering event, but the ordinance, by its own terms, does not mandate the temporary sign comply with content restrictions. Although it may seem "bizarre" to plaintiffs to read the ordinance as allowing temporary signs, regardless of content, during certain events, this is precisely what the ordinance says and it reveals the extent the City is willing to go to avoid content-based restrictions on expression. *See G.K. Ltd. Travel I,* 2004 WL 817142, at *7-*8, 2004 U.S. Dist. LEXIS 6984 at *21.

2. *Grandfather clause*

Plaintiffs argue that the Sign Code's grandfather clause, LOC § 47.04.100(1), is content based under *Foti* because, in order to evaluate whether the pre-existing sign must now conform to the Code, the City official must "read[the] sign's message" and determine whether there has been a "change of logo and/or message upon the face" of the sign or if the sign has otherwise been altered.[12] *See Foti,* 146 F.3d at 636; LOC § 47.03.015 (defining "change of copy"). Plaintiffs attempt to broaden *Foti* to stand for the proposition that any time an ordinance requires a law enforcement officer to read a sign, the ordinance must be content based. We reject such an expansive reading. The

[12] In regards to pole signs, the Code's grandfather clause lapsed as of May 21, 2004. *See* LOC § 47.04.100(5). In regards to other types of signs, however, the grandfather clause remains in force.

*Foti* test actually turns on "whether the ordinance singles out certain speech for differential treatment based on the idea expressed," *id.* at 636 n. 7; enforcement officials having to read a sign is persuasive evidence of such a purpose but may not always be dispositive.

In *Foti,* we evaluated a Menlo Park ordinance banning all signs on all public property. The law, however, exempted "open house," safety, traffic and public information signs. Relying on our earlier ruling in *Desert Outdoor Adver. v. City of Moreno Valley,* 103 F.3d 814, 820 (9th Cir.1996), we concluded that these exemptions were content based "because a law enforcement officer must read a sign's message to determine if the sign is exempted from the ordinance." *Foti,* 146 F.3d at 636. Menlo Park was clearly expressing a preference for certain types of signs by exempting them from the city's general prohibition. The only way to determine if a sign was the type qualified to receive Menlo Park's favorable treatment was to evaluate the content and substantive message of the sign.

Unlike in Menlo Park, here, City officials have to read signs only to determine whether the text of the sign or a logo on the sign has changed – i.e., whether it is a verbatim replication of the original text or an exact duplication of the previous logo. As the City notes, even those who speak no English could perform this superficial review function by placing the former sign next to the new sign and examining the characters and elements on both. Unlike *Foti's* exemptions, the grandfather clause does not require Lake Oswego officials to evaluate the substantive message on the preexisting sign and the clause certainly does not favor speech "based on the idea expressed." *Id.* at 636 n. 7. A grandfather provision requiring an officer to read a sign's message for no other purpose than to determine if

the text or logo has changed, making the sign now subject to the City's regulations, is not content based. *See Hill v. Colorado,* 530 U.S. 703, 720, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) ("We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct.").

3. *Design review provision*

Section 47.06.200(5) allows City officials, during the permitting process, to review signs for "clarity and readability." Plaintiffs suggest that this provision allows City officials to prefer certain speech and regulate all messages on the basis of content. The City counters by offering a limiting construction, asserting that clarity and readability refer only to *legibility* and not intelligibility. *G.K. Ltd. Travel I,* 2004 WL 817142, at *8, 2004 U.S. Dist. LEXIS 6984 at *22. Without the City's construction, the provision would be suspect; however, we consider the City's limiting construction reasonable. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494 n. 5, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) ("In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered."). Review for legibility entails, for example, an official reading a sign to ensure that its text is visible from streets so as not to distract passing motorists. Legibility review does not allow the City to regulate the substance of the message contained in a sign. We hold that the design review provision, as limited by the City's construction, is content neutral.

B. Remaining *Ward* Factors

1. *Significant interest*

The Sign Code, in total, is a content-neutral regulation of speech. We must still determine whether the Code is narrowly tailored to achieve significant government interests and leaves open ample alternative channels for communication. As explained in our discussion of the pole sign regulation, part II.B *supra*, the City's interests in regulating speech to preserve aesthetics and protect traffic and traveler safety are significant.

2. *Narrow tailoring*

We have already concluded that the pole sign restriction is narrowly tailored and similarly conclude that the remainder of the Sign Code's regulations are narrowly tailored to achieve the City's significant interests. The City's regulations, limiting the type, size and number of signs permissible within its borders, are "reasonable legislative judgments in light of the City's concern[s]. . . ." *Foti*, 146 F.3d at 641.[13] For example, pole signs and internally illuminated signs may distract travelers as they are driving down the City's streets, posing a hazard to traffic safety. *See id.* ("A fifteen square foot sign carried by a protester on a public sidewalk, when compared to a three square foot sign, may block drivers' views of road signs

[13] Further evidence of the City's desire to tailor the Sign Code is found in the Code's variance procedure. City officials may grant a variance so a party can avoid the strictures of the Code where "[s]trict application of the [C]ode requirement would deny the applicant a reasonable opportunity to communicate by sign in a manner similar to like persons or uses because of an unusual or unique circumstance. . . ." LOC § 47.12.500(2)(A).

and traffic conditions, intimidate pedestrians, and obstruct the safe and convenient circulation of pedestrians on the sidewalk.") Additionally, the proliferation of temporary signs in the City's residential zones may create visual clutter and otherwise distract from the City's neat and orderly appearance. Without these restrictions, it is difficult to imagine how the City would achieve its goals of preserving aesthetics and protecting traffic safety. "Here, no less restrictive means of accomplishing the government's objectives is readily apparent." *Bland,* 88 F.3d at 736; *see also Ward,* 491 U.S. at 799, 109 S.Ct. 2746 ("[T]he requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.") (internal citation and quotation marks omitted).

3. *Ample alternative channels*

*In Taxpayers for Vincent,* the Supreme Court evaluated a severely restrictive Los Angeles ordinance prohibiting the posting of signs on public property. 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). The Court upheld this prohibition as a valid, content-neutral time, place or manner restriction. In its discussion of the availability of ample alternative channels for communication, the Court noted,

> The Los Angeles ordinance does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited. To the extent that the posting of signs on public property has advantages over these forms of expression, there is no reason to believe that these same advantages cannot be obtained

> through other means. To the contrary, the findings of the District Court indicate that there are ample alternative modes of communication in Los Angeles. Notwithstanding appellees' general assertions in their brief concerning the utility of political posters, nothing in the findings indicates that the posting of political posters on public property is a uniquely valuable or important mode of communication, or that appellees' ability to communicate effectively is threatened by ever-increasing restrictions on expression.

*Id.* at 812, 104 S.Ct. 2118 (internal citation omitted). Similarly, the Sign Code, although significantly restricting pole signs and regulating the type and manner of other signs, does not threaten the ability of Lake Oswego residents to "communicate effectively." Residents of the City may resort to any number of alternative channels for communication; indeed, the Code does not prohibit residents from communicating through signs so long as those signs otherwise comply with the Code's restrictions.[14]

We hold that the Sign Code is a valid content-neutral restriction on the time, place or manner of speech, narrowly tailored to serve the City's significant interests without impermissibly limiting the alternative channels for communication. "[T]he ordinance does not create an unacceptable threat to the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Id.* at 817, 466 U.S.

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[14] Several sections of the Code list allowable signs (subject to the City's permitting process), including, in various zones, blade, cornice, awning, monument, window and canopy signs. *See* LOC §§ 47.10.410(D), 47.10.412(1), 47.10.415, 47.10.420.

789 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)).

## IV. Commercial/Noncommercial Speech Distinction

"[A]n ordinance is invalid if it imposes greater restrictions on noncommercial than on commercial billboards or regulates noncommercial billboards based on their content." *Nat'l Adver. Co. v. City of Orange*, 861 F.2d 246, 248 (9th Cir.1988) (citing *Metromedia*, 453 U.S. at 513, 516, 101 S.Ct. 2882). Plaintiffs claim that various subsections of section 47.08.300, regulating temporary signs in residential zones, violate *Metromedia's* rule. Section 47.08.300 contains a list of events (e.g., an election or the sale, lease or rental of a property), the occurrence of which allows a resident to erect a temporary sign, not exceeding listed dimensions, for a limited time period. The City states that temporary signs need not concern a specific, enumerated topic, such as the sale of property, but can be about any subject matter so long as the sign is displayed during the relevant time period and is within the Code's size limits.

The sections challenged do not indicate the City's preference for commercial speech nor do they regulate based on the content of speech. *See* LOC § 47.08.300(B)(1) ("This signage shall not be restricted by content. . . ."). Rather, the regulations exempt signs from the Code's permit requirement during certain events. For example, 90 days prior to an election and five days afterwards, a resident may erect a temporary sign not exceeding six square feet without a permit. § 47.08.300(B)(1)(a). The City insists that the temporary sign could contain a purely commercial message so long as it meets the Code's temporal and size

limitations. The district court was convinced by the City's argument, stating, "it is a fair reading of the provisions and demonstrates the lengths to which the City has gone to regulate signs without doing so on the basis of content." *G.K. Ltd. Travel I,* 2004 WL 817142, at *7, 2004 U.S. Dist. LEXIS 6984 at *21. The fact that no officer must read the temporary sign's message to determine if it falls into the Code's permit exemption further evidences the content neutrality of the temporary sign provision. *See Nat'l Adver. Co.,* 861 F.2d at 248.

We are similarly convinced that section 47.08.300 does not impermissibly favor commercial over noncommercial messages, nor does it regulate noncommercial messages on the basis of content. Where, as here, the Code is "neutral with respect to noncommercial messages," the *Metromedia* concern about cities distinguishing between myriad communicative interests is not implicated. *Clear Channel Outdoor, Inc. v. City of Los Angeles,* 340 F.3d 810, 814 (9th Cir.2003); *see also Metromedia,* 453 U.S. at 514, 101 S.Ct. 2882.

## V. Prior Restraint

Plaintiffs contend that the permitting requirement of section 47.10.400 is an unconstitutional prior restraint on speech. That section provides:

> It is unlawful and a civil violation for any person to erect, construct, alter or relocate any sign without first obtaining a permit pursuant to the provisions of this chapter unless a provision of this chapter specifically exempts a sign from the permit requirement.

LOC § 47.10.400(1). The City acknowledges that the review authorized by the permitting scheme authorizes "some discretion," but asserts that City officials are not reviewing signs based on content. Plaintiffs attack the City's permitting scheme on two grounds: first, it does not contain adequate procedural protections for speakers and, second, it gives unbridled discretion to local law enforcement officials.

A. Procedures

Generally, prior restraints are constitutionally suspect and may stand only if they are imposed for a short period of time and provide a process for adequate and swift appeal to a judicial body. *See Freedman v. Maryland,* 380 U.S. 51, 57-59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). In *Freedman,* the Court evaluated a film review procedure whereby a state law required a film exhibitor to submit his film to a censor prior to having it displayed at a local theater. The Court held that such a review process survives constitutional scrutiny only if the system incorporates "procedural safeguards designed to obviate the dangers of a censorship system." *Id.* at 58, 85 S.Ct. 734. Plaintiffs argue that the Sign Code does not satisfy the *Freedman* dictate because the Code's permitting scheme fails to contain necessary procedural safeguards such as a process for swift appeal to a judicial body. However, in *Thomas v. Chicago Park District,* the Court evaluated a content-neutral licensing scheme that was challenged under the *Freedman* prior restraint doctrine and concluded, "*Freedman* is inapposite because the licensing scheme at issue here is not subject-matter censorship but content-neutral time, place, and manner regulation of the use of a public forum." 534 U.S. 316, 322, 122 S.Ct. 775,

151 L.Ed.2d 783 (2002); *accord S. Or. Barter Fair v. Jackson County,* 372 F.3d 1128, 1138 (9th Cir.2004) (a permitting scheme requiring permits even for private gatherings did not violate *Freedman* "because it is content-neutral, [and therefore] the Act need not contain the procedural safeguards required of content-based regulations."). Likewise, because we have held that the Sign Code is content neutral, the procedural requirements of the prior restraint doctrine need not be satisfied. *Id.* at 1137 ("[N]one of the *Freedman* safeguards are required of content-neutral time, place, and manner permit schemes.") (quoting *Thomas,* 534 U.S. at 320-23, 122 S.Ct. 775).

B. Unbridled Discretion

The prior restraint doctrine requires review of both the law's procedural guarantees and the discretion given to law enforcement officials. Even though content-neutral laws need not incorporate the strict procedural guarantees of *Freedman,* they must avoid placing unbridled discretion in the hands of government officials. *See FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 225-26, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). The requirement of sufficient direction for City officials seeks to alleviate the threat of content-based, discriminatory enforcement that arises "[w]here the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit. . . ." *Chicago Park Dist.,* 534 U.S. at 323, 122 S.Ct. 775. To avoid impermissible discretion, the challenged ordinance should "contain adequate standards to guide the official's decision and render it subject to effective judicial review." *Id.*

The Code requires most who seek to speak through the medium of a sign to obtain a permit from a City

official. *See* LOC § 47.10.400. The plaintiffs argue that this permit process, authorizing City officials to review signs for compatibility, LOC § 47.06.200(4), fails to contain the standards demanded in *Chicago Park District* and thus renders the Code an unlawful prior restraint.[15] Plaintiffs believe that there are few, if any, limits on the discretion of permitting officials so the officials may reject signs merely because they do not like the message conveyed or the speaker. We disagree.

The City may deny permits only when the sign does not comport with the Code's reasonably specific size and type criteria or is not compatible with the surrounding environment. Both reference to the surrounding environment and the "compatibility" determination are explicitly defined in the Code. Officials are to look only to the proposed sign's relationship "with other nearby signs, other elements of street and site furniture and with adjacent structures." *Id.* In determining whether the sign is compatible, the Code instructs permitting officials to consider a limited and objective set of criteria, namely "form, proportion, scale, color, materials, surface treatment, overall sign size and the size and style of lettering." *Id.* Additionally, the Code requires that most permit applications be processed within 14 days of receipt of the application, instructs applicants what to include in the application and allows for appeal to the City Council. *See* LOC § 47.10.400; *see also Chicago Park Dist.*, 534 U.S. at

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[15] Section 47.06.200(4) provides that signs must "be compatible with other nearby signs, other elements of street and site furniture and with adjacent structures. Compatibility shall be determined by the relationships of the elements of form, proportion, scale, color, materials, surface treatment, overall sign size and the size and style of lettering."

324, 122 S.Ct. 775 (favorably noting that the Park District must respond to a permit application within 28 days). General provisions of the City of Lake Oswego Code also require that the permitting official state the reasons for his or her decision to either grant or deny a permit so as to facilitate effective review of the official's determination. *See* LOC § 50.81.015 (2005) ("Approval or denial of a [minor development permit] application shall be accompanied by written findings that explain the criteria and standards considered relevant to the decision, state the facts relied upon in rendering the decision and explain the justification for the decision based on the criteria, standards and facts set forth."); *cf. City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 769, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988) (holding unconstitutional a news-rack permitting ordinance in part because "nothing in the law as written requires the mayor to do more than make the statement 'it is not in the public interest' when denying a permit application."). Requiring the articulation of reasons ensures that the compatibility determination is properly limited in scope and allows the Sign Code to be "enforceable on review." *Chicago Park Dist.*, 534 U.S. at 324, 122 S.Ct. 775; *see also S. Or. Barter Fair*, 372 F.3d at 1140 ("These limits objectively constrain the governing body's discretion and allow effective judicial review.").

This case is distinguishable from *Desert Outdoor Adver. v. City of Moreno Valley* where we invalidated as an unlawful prior restraint an ordinance requiring residents to obtain permits prior to installing off-site signs. 103 F.3d at 818-19. The permitting official made determinations upon finding that the proposed display "will not have a harmful effect upon the health or welfare of the general public . . . and will not be detrimental to the aesthetic

quality of the community or the surrounding land uses." *Id.* at 817. In concluding that the ordinance impermissibly vested unbridled discretion in the hands of local officials, we stated "[The ordinance] contains no limits on the authority of City officials to deny a permit. . . . Moreover, City officials can deny a permit without offering any evidence to support the conclusion that a particular structure or sign is detrimental to the community." *Id.* at 819. In Lake Oswego, however, the standard governing compatibility review is much more specific – "compatibility shall be determined by the relationship of . . . " – than mere reference to "the aesthetic quality of the community or surrounding land uses." And, as already noted, Lake Oswego permitting officials must explain why the sign is incompatible and therefore not worthy of a permit. We are satisfied that the Sign Code contains appropriate standards "cabining the administrator's discretion." *S. Or. Barter Fair,* 372 F.3d at 1140.

Plaintiffs also complain that the Code's design review clause is so subjective that permitting officials are allowed to censor expression. However, plaintiffs fail to point to any section of the Code giving officials the discretion to restrict signs by content. Plaintiffs are unable to identify a single case of actual censorship of content by the permitting authority. *See S. Or. Barter Fair,* 372 F.3d at 1140 (in rejecting unbridled discretion claim, we noted, "we lack actual evidence of a pattern of abuse."); *cf. City of Lakewood,* 486 U.S. at 758, 108 S.Ct. 2138. In almost all instances, the parties have been able to come to resolution regarding the compatibility issues raised by the permitting official.[16]

[16] In only one case did an applicant appeal the denial of a permit and this appeal ended favorably for the applicant.

Sometimes, as plaintiffs identify, the dialogue with the City breeds resentment or frustration on the part of the permit seeker as businesses do not want to negotiate their sign design with the City. Nonetheless, frustration of those who are regulated by the Sign Code is not sufficient evidence that the regulators are granted unbridled discretion. Absent evidence of government abuse, we are unwilling to conclude that the Code operates as an unlawful prior restraint. "[W]e think that this abuse [of the permitting process] must be dealt with if and when a pattern of unlawful favoritism appears, rather than by insisting upon a degree of rigidity that is found in few legal arrangements." *Chicago Park Dist.*, 534 U.S. at 325, 122 S.Ct. 775. *See also S. Or. Barter Fair,* 372 F.3d at 1139 ("Should abuse occur, it may be remedied adequately through as-applied challenges like the Fair's § 1983 claim.").

The City's permitting scheme includes standards that "are reasonably specific and objective, and do not leave the decision to the whim of the [permitting official]." *Chicago Park Dist.*, 534 U.S. at 324, 122 S.Ct. 775 (internal citation and quotation marks omitted). Although the design review criteria are somewhat elastic and require reasonable discretion to be exercised by the permitting authority, this alone does not make the Sign Code an unconstitutional prior restraint. *See Ward,* 491 U.S. at 794, 109 S.Ct. 2746 ("While these standards are undoubtedly flexible, and the officials implementing them will exercise considerable discretion, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.").

## VI. Vagueness

A government regulation may be unconstitutionally vague for two reasons. First, the regulation may fail to give persons of ordinary intelligence adequate notice of what conduct is proscribed; second, it may permit or authorize "arbitrary and discriminatory enforcement." *Hill v. Colorado,* 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). "[T]hese vagueness concerns are more acute when a law implicates First Amendment rights and, therefore, vagueness scrutiny is more stringent." *Cal. Teachers Ass'n v. State Bd. of Educ.,* 271 F.3d 1141, 1150 (9th Cir.2001).

Plaintiffs contend that the Sign Code is unconstitutionally vague, but fail to point to specific provisions of the Code that are suspect. They focus most of their energy arguing that the Code does not notify the citizenry of what conduct is prohibited. To support their claim, plaintiffs again identify statements from City residents expressing frustration with the City's design review policy.

The Sign Code appears quite clearly to describe what conduct is permitted in the City. The Code provides explicit sign size and type requirements. *See, e.g.,* LOC §§ 47.04.115, 47.08.300. For example, a business, like G.K., that seeks to put up a pole sign is adequately aware, through the text of the Code itself, that it generally may not do so without an exemption (granted only in limited circumstances), LOC § 47.10.410(D), or a variance, LOC § 47.12.500. The Code states which signs are exempt from permitting. For example, a resident seeking to place a sign on her property during elections knows that so long as the sign is within certain dimensions, she may do so without a permit. The Code offers a thorough and precise list of

definitions for the various types of signs. *See* LOC § 47.03.015. And the Code requires most parties to obtain a permit prior to erecting a sign, thereby preventing unexpected citations. Thus, "it is clear what the ordinance, as a whole, prohibits." *Hill,* 530 U.S. at 733, 120 S.Ct. 2480.

In addition to providing notice of what conduct is punishable, the clarity of the Code's proscriptions avoids the fear of arbitrary and discriminatory enforcement. City officials may not punish sign owners simply for displaying a message with which they disagree – the sign must violate one of the specific provisions of the Code. Similarly, the City will punish those who allow temporary signs to remain on their property more than five days following an election (unless some other exemption applies). *See* LOC § 47.08.300(B)(1). City officials are to enforce the Code as it is written and the City provides sufficient guidance in the Code's numerous sections to avoid "delegat[ing] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis. . . ." *Grayned v. City of Rockford,* 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

With respect to the Code's permitting process, which we have already held is not an invalid prior restraint, there is admittedly an element of subjectivity to the determination of "compatibility." LOC § 47.06.200(4). However, this subjectivity, alone, does not render the Code unconstitutionally vague. The City is not obligated to provide numerical or otherwise technical definitions of the bounds of compatibility. *See Grayned,* 408 U.S. at 110, 92 S.Ct. 2294 ("Condemned to the use of words, we can never expect mathematical certainty from our language."). Furthermore, the impreciseness of compatibility is mitigated by

the clarity of the rest of the design review section directing officials to determine compatibility with reference to form, color, shape, size, etc. LOC § 47.06.200(4); *see Gammoh v. City of La Habra,* 395 F.3d 1114, 1120 (9th Cir.2005) ("[O]therwise imprecise terms may avoid vagueness problems when used in combination with terms that provide sufficient clarity.").

Plaintiffs would have us invalidate the entire Code because of the reasonable subjectivity of the design review process. We will not do so. "Vagueness doctrine cannot be understood in a manner that prohibits governments from addressing problems that are difficult to define in objective terms." *Id.* at 1121. *See also Cal. Teachers Ass'n,* 271 F.3d at 1151 ("[E]ven when a law implicates First Amendment rights, the constitution must tolerate a certain amount of vagueness."). The Sign Code is not unconstitutionally vague.

The district court's grant of summary judgment in favor of the City is AFFIRMED.

# APPENDIX B

2004 WL 817142 (D. Or.)

United States District Court, D. Oregon.
G.K., LTD. TRAVEL, an Oregon Corporation,
W.H. Gillison, Ramsay Signs, Inc., an Oregon Corporation,
and Kathleen Kusudo, Plaintiffs,
v.
CITY OF LAKE OSWEGO and Sandy Ingalls, Defendants.
**No. 02-1147-KI.**

March 29, 2004.

Douglas M. Bragg, Tualatin, Oregon, John F. Winston, Sherwood, Oregon, Stephen F. Crew, T. Chad Plaster, Ramis Crew Corrigan & Bachrach, LLP, Portland, Oregon, for Plaintiffs.

Timothy J. Sercombe, Stuart M. Brown, Preston Gates & Ellis, LLP, Portland, Oregon, for Defendants.

## OPINION

KING, J.

Before the court are defendants' motion for summary judgment (# 38) and plaintiffs' motion for partial summary judgment (# 43). Oral argument on these motions was held on November 10, 2003. After oral argument, a change in counsel for plaintiffs occurred. New counsel requested the opportunity to file an amended reply brief. I granted plaintiffs' request and they filed an amended reply brief on January 30, 2004. I also granted leave to defendants to file a sur-reply brief, which was filed on February 11, 2004. The motions were taken under advisement on March 9, 2004, following additional written arguments submitted by the parties.

For the reasons set forth below, I grant in part and deny in part both motions.

## FACTS

Plaintiffs challenge actions taken by the City of Lake Oswego and its former Code Enforcement Specialist, Sandy Ingalls, regarding plaintiffs' advertising on a pole sign in a "general commercial" zone of the City. In addition to their claims regarding how the City's sign regulations were applied to them, plaintiffs also bring facial challenges to the constitutionality of those regulations and seek to have them stricken as unconstitutional.

### I. *The City's Sign Code*

On or about January 5, 1994, the City adopted Ordinance No.2085. That ordinance repealed then-existing regulations governing signs and replaced them with a new comprehensive set of sign regulations which were codified in Chapter 47 of the Lake Oswego Code (hereinafter, the "Sign Code"). The City's reason for adopting the Sign Code was in part to cure constitutional defects in its then-existing sign regulations. The Sign Code has since undergone four additional minor amendments.

Various sections of the Sign Code disallow pole signs, with some exceptions. The 1994 version of the Sign Code directed that nonconforming signs conform within five years of the Sign Code's effective date and required the removal of pole signs by February 3, 1999, or sooner if a new business or use necessitated an alteration. Thereafter, the City sent notices to businesses and local associations and held several public hearings on issues related to the Sign Code and whether the Sign Code adequately advanced

business interests. Ultimately, the City Council extended the time for compliance for nonconforming signs to May 21, 2004 (i.e., the date on which the "amortization period" would end for nonconforming signs).

Following the filing of this case, the City adopted Ordinance No. 2358, which implements an amendment to Section 47.04.100 of the Sign Code. The amendment removes the May 21, 2004, deadline for removing and replacing all nonconforming signs in the City for all signs *except* pole signs.

## II. *The Pole Sign*

A pole sign of approximately 40 square feet in area was constructed in 1980 on property with an address of 15835 Boones Ferry Road, Lake Oswego, Oregon. The pole sign was originally and is currently owned by plaintiff Ramsay Signs, Inc. ("Ramsay").

In 1980, the City's sign regulations required a permit from the City prior to construction of a pole sign. The sign regulations at the time only allowed "ground signs" in the industrial and commercial zoning districts. The sign at issue in this case was a "ground sign" under the regulations in effect at the time. Neither plaintiffs nor the City has any record of a permit having been issued in 1980 for the construction of the sign.

Ramsay began leasing the sign to Apollo Travel, Inc. ("Apollo"), a travel agency, in 1980. Ramsay continued to lease the pole sign to Apollo until 1996, when Apollo sold its operation to Keller & Pinnell Travel, LLC, dba Journeys! of Lake Oswego ("Journeys"). At that time, Ramsay changed the content of the sign to reflect the new name of

the travel agency. The version of the Sign Code applicable at the time Journeys purchased Apollo required the removal of nonconforming pole signs by February 3, 1999, or sooner if a new business or use necessitated an alteration. The City, however, did not require the Journeys sign to be removed or replaced.

In February 2001, plaintiff G.K., LTD. ("GK") purchased Journeys. GK also operates a travel agency at the same location. Without modifying the structure of the sign, Ramsay changed the copy content of the sign in early 2001 from "Journeys! of Lake Oswego, Formerly Apollo Travel" to "G.K. Ltd Travel Groups Tours Cruises Complete Travel Services Domestic & International." Plaintiffs made this modification without a permit.

Prior to GK's purchase of Journeys, plaintiffs were aware that the pole sign would have to be replaced with a different type of sign at the end of the amortization period.

On or about April 27, 2001, defendant Ingalls, acting as the Code Enforcement Specialist for the City, sent a letter to plaintiffs regarding the pole sign. Ingalls informed plaintiffs that the sign was nonconforming and alerted plaintiffs that the sign was installed without a permit.

On or about May 29, 2001, plaintiffs applied for a sign permit and requested permission to retain the pole structure and the size of the existing sign. Ingalls, on behalf of the City, denied the permit in June 2001.

On or about August 23, 2001, the City cited GK for using a prohibited pole sign.

In October 2001, Ramsay applied for a variance to retain the existing pole sign and to allow an oversized sign

(40 square feet instead of the 32 square-foot maximum). The City's Planning Director denied the variance application on or about December 17, 2001.

Ramsay appealed the decision to the City's Development Review Commission. After a hearing on the appeal on February 4, 2002, the Commission denied the variance in an order dated March 4, 2002.

Ramsay then appealed to the City Council, which held a public hearing on April 16, 2002. On May 14, 2002, the City Council issued findings and conclusions and entered an order affirming the Commission's denial of the variance. Ramsay did not appeal these findings and conclusions. GK did not present evidence or testimony in the City Council proceeding.

This case was filed on August 23, 2002. The City has halted enforcement of the Sign Code against plaintiffs pending resolution of this case. The pole sign remains in place and displays the advertisement for GK.

## LEGAL STANDARDS

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). On a motion for summary judgment, the evidence is viewed in the light most favorable to the nonmoving party. *Robi v.*

*Reed,* 173 F.3d 736, 739 (9th Cir.), *cert. denied,* 528 U.S. 375 (1999).

## DISCUSSION

### I. *Nature of Plaintiffs' Claims*

In their First Amended Complaint, plaintiffs assert seventeen claims, pursuant to 42 U.S.C. § 1983, related to the City's Sign Code. Defendants seek summary judgment against all of plaintiffs' claims. Plaintiffs seek summary judgment on all of their claims except claims five, six, seven, eleven, fifteen, and seventeen.

Claims one through four assert violations of the First Amendment through unconstitutional regulation of commercial speech *as applied* to plaintiffs. Specifically, plaintiffs take the City to task for its enforcement of the Sign Code against plaintiffs' pole sign.

Plaintiffs also bring myriad *facial* constitutional challenges against the Sign Code under the First Amendment (based on the regulation of commercial and non-commercial speech) in claims eight, nine, ten, eleven, twelve, thirteen, fourteen, sixteen and seventeen.

In claim five, plaintiffs allege that they were denied equal protection under the law because of selective enforcement of the Sign Code based on race.

In claims six and seven, plaintiffs assert that enforcement of the Sign Code has effected an illegal taking of their property interests.

Finally, in claim fifteen, plaintiffs bring an equal protection challenge against the Sign Code on the basis

that, on its face, it unconstitutionally discriminates between similarly situated persons.

As is evident from plaintiffs' claims, the primary thrust of this case relates to plaintiffs' First Amendment challenges to the Sign Code. I first address plaintiffs' facial constitutional challenges to the Sign Code under the First Amendment. I then discuss plaintiffs' as-applied challenges to the Sign Code as it relates to regulating pole signs. In the final section of this Opinion, I address the remaining claims (i.e., claims five, six, seven, and fifteen) and any unresolved issues.

## II. *Facial Challenges to the Sign Code under the First Amendment*

### A. *Plaintiffs' standing*

Although defendants have not contested plaintiffs' standing to challenge the constitutionality of the Sign Code on its face, it is important to observe that prudential standing rules are somewhat relaxed in the First Amendment context. Normally, a party bringing a lawsuit must show an actual or threatened injury resulting from the alleged illegal action and may only assert a violation of its own rights. In the context of the First Amendment, however, a third party can bring a facial challenge on the basis that a law regulates speech based on content, *R.A.V. v. City of St. Paul,* 505 U.S. 377, 381 (1992), or contains a prior restraint of protected speech, *City of Lakewood v. Plain Dealer Pub. Co.,* 486 U.S. 750 (1988). Plaintiffs assert facial challenges to the Sign Code under both of these theories.

B. *Are the challenged provisions of the Sign Code content-neutral or content-based?*

To determine whether government restrictions on speech can be upheld as constitutional, the principal inquiry is whether the restrictions are content-neutral or content-based. *Foti v. City of Menlo Park,* 146 F.3d 629, 636 (9th Cir.1998). In *Ward v. Rock Against Racism,* 491 U.S. 789, 791-92, *reh'g denied,* 492 U.S. 937 (1989), the Supreme Court provided the following guidance for how to determine whether a regulation is content-neutral or content-based:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed content neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is "*justified* without reference to the content of the regulated speech."

(Quoting *Clark v. Cmty. for Creative Non-Violence,* 468 U.S. 288, 293 (1984); other citations omitted; emphasis in original); *see also Madsen v. Women's Health Ctr., Inc.,* 512 U.S. 753, 763 (1994) ("Our principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech 'without reference to the content of the regulated speech.' . . . We thus look to the government's purpose as the threshold consideration." (Citations omitted)).

In *Foti, supra,* the Ninth Circuit considered whether a city ordinance regulating picketing, leafleting, and displaying of signs on public property was content-neutral. The court stated: "'As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.'" *Foti,* 146 F.3d at 636 (quoting *Turner Broad. Sys., Inc. v. F.C.C.,* 512 U.S. 622, 643, *reh'g denied,* 512 U.S. 1278 (1994)). When considering the exemptions to a ban on signs on public property at issue in *Foti,* the court concluded that the exemptions were content-based "because a law enforcement officer must read a sign's message to determine if the sign is exempted from the ordinance" and "when 'exceptions to the restriction on noncommercial speech are based on content, the restriction itself is based on content.'" *Foti,* 146 F.3d at 636 (quoting *Nat'l Adver. Co. v. City of Orange,* 861 F.2d 246, 249 (9th Cir.1988)). Applying this test, the *Foti* court declared exemptions in the sign ordinance at issue for "open house" real estate signs and safety, traffic, and public informational signs to be content-based. *Foti,* 146 F.3d at 636. The court also cited favorably similar conclusions in other Ninth Circuit cases, such as *Desert Outdoor Adver. v. City of Moreno Valley,* 103 F.3d 814, 820 (1996), *cert.denied,* 522 U.S. 912 (1997) (addressing exemptions for signs such as official government notices and directional, warning, or informational signs), and *Nat'l Adver.,* 861 F.2d at 248 (addressing exemptions for signs such as real estate signs). *Id.*

In arguing that certain provisions of the Sign Code are content-based,[1] plaintiffs rely heavily on the test set forth in *Foti* (i.e., that if a sign's message must be read to determine its legality, the sign ordinance must then be content-based). At the outset, I note that the *Foti* test only makes sense when the government regulation at issue has defined an acceptable or unacceptable sign based on the message it is trying to convey (e.g., a sign that advertises an open house). The test does not make sense when the applicable government regulation is not based on a sign's message but is, instead, based on a sign's appearance or change in its appearance. As such, the fact that a law enforcement officer has to examine a sign to determine its legality is not always dispositive. For instance, the fact that the applicability of certain provisions of the Sign Code is dependent on whether a sign uses flashing lights or whether a change in copy or appearance of a sign has occurred does not mean that those provisions (or provisions that define terms like "alter" or "change of copy") are content-based. Through these latter and similar provisions,[2] the City is not attempting to regulate the content of

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[1] In their briefs, plaintiffs list the alleged "offending" (i.e ., content-based) sections of the Sign Code. *See* Plaintiffs' Amended Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment, pp. 11-16, 24-25; *see also* Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment, p. 31, n. 9; p. 33, n. 11; pp. 35, 38 (identifying and discussing plaintiffs' alleged content-based provisions of the Sign Code). A more concise and defensible list of challenged provisions is provided by plaintiffs in one of their reply memoranda. *See* Plaintiffs' Reply Memorandum in Support of Motion for Partial Summary Judgment, p. 10.

[2] This includes Section 47.04.100(1), which plaintiffs characterize as content-based in their as-applied challenges to the Sign Code. That section states:

(Continued on following page)

a sign or determine its message but is, instead, defining triggering events such as when a grandfathered, non-conforming sign must be brought up to code or removed. Such a system is a reasonable means of protecting the investment of current sign owners or users from newly-imposed sign regulations.

Not only can the test articulated in *Foti* lead to an overly simplistic approach to whether a regulation is content-based, it can also detract from the more holistic analysis that a court should apply when analyzing the constitutionality of regulations that impact speech. As the Supreme Court emphasized in *Ward, supra,* a court must look at the purpose behind government regulation of speech, especially when dealing with time, place, or manner restrictions, as most of the Sign Code provisions clearly are. With a few minor exceptions noted below, I cannot discern any purpose or intent by the City to favor or disfavor certain messages, content, or viewpoints through the Sign Code provisions challenged by plaintiffs.

I now examine the few provisions of the Sign Code that are arguably content-based.

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A non-conforming sign in all zones other than the EC zone as described and established by the Lake Oswego Zoning Code may be maintained or undergo a change of copy without complying with the requirements of this chapter, with the exception that any change for a new business or use or any changes in a wall sign which is painted on a structure will comply with this chapter at such time as change in copy or alteration occurs.

1. *Exemptions to permit and fee requirements for permanent signs*

In Section 47.06.205 of the Sign Code, certain permanent types of signs are exempted from fee, permit, or application requirements, although they must still comply with all other provisions and regulations of the Sign Code. In particular, no fee, permit, or application is required for "[p]ublic signs, signs for hospital or emergency services, legal notices, railroad signs, and danger signs." LOC 47.06.205(4). Plaintiffs argue that these provisions violate the *Foti* test because an enforcement officer must read a sign's message to determine if it is subject to these provisions.

The City offers a limiting construction of these provisions to support a finding that they are not content-based. *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n. 5, *reh'g denied*, 456 U.S. 950 (1982) ("In evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a[n] . . . enforcement agency has proffered."); *see also Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 611 (9th Cir.1993) (the court has a duty "to interpret a statute, if fairly possible, in a manner that renders it constitutionally valid."). Specifically, the City argues that "signs for hospital or emergency services" means signs owned by hospital and emergency service providers. Likewise, "railroad signs" means signs owned by railroads.

I find this construction to be reasonable and likewise read "public signs" to mean signs placed by government entities. Plaintiffs respond that such a construction still renders the Sign Code provisions constitutionally suspect

because they are now viewpoint-based.[3] In the absence of binding authority on point, I am reluctant to accept plaintiffs' argument and I refrain from declaring an exemption from fee, permit, and application requirements for government entities, railroads, and hospital and emergency service providers to be content- or viewpoint-based. I do note, however, that the Ninth Circuit in *Foti, supra,* stated that it was "troubled by the wholesale exemption for government speech" in the sign ordinance at issue in that case. *Foti,* 146 F.3d at 637. The court, nonetheless, decided not to rule on the issue and affirmed the district court's finding that the exemption was not content-based. *Id.* at 638.

Of course, even with the construction offered by the City, there remains the issue of whether "legal notices" and "danger signs" are content-based exemptions to the fee, application, and permit provisions of the Sign Code. Given Ninth Circuit precedent, it is difficult to conclude otherwise. For instance, in *Desert Outdoor Adver.,* 103 F.3d at 820, the court declared exemptions in a sign ordinance for "official notices" and "warning" signs to be content-based and, ultimately, unconstitutional.

The other exemption applicable to permanent signs that plaintiffs challenge is set forth at Section 47.06.205(10) of the Sign Code. It exempts "no solicitation" signs (as permitted by Section 34.16.945 of the Sign Code). As the City concedes, this provision is also content-based.

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[3] In making this assertion, and many of their other key arguments, plaintiffs rely almost exclusively on two opinions from district courts outside of the Ninth Circuit. *See North Olmstead Chamber of Commerce v. City of North Olmstead,* 86 F.Supp.2d 755 (N.D.Ohio 2000); *King Enter., Inc. v. Thomas Township,* 215 F.Supp.2d 891 (E.D.Mich.2002).

2. *Regulation of temporary signs*

In Section 47.08.300 of the Sign Code, certain temporary signs are allowed and exempted from fee, permit, or application requirements, although they must still comply with all other provisions and regulations of the Sign Code. Section 47.08.300(B) of the Sign Code, entitled "Allowed Signage," sets forth which temporary signs are allowed in residential zones, as well as which temporary signs are allowed in commercial or industrial zones. Section 47.08.300(B)(1) states:

> In any residential zone temporary signage shall be allowed for each and every lot. *This signage shall not be restricted by content,* but is usually and customarily used to advertise real estate sales, political or ideological positions, garage sales, home construction or remodeling, etc. Signage shall be allowed for each lot as follows:
>
> a. Temporary signs not exceeding six square feet, provided the signs are erected not more than 90 days prior to an election and removed within five days following the election.
>
> b. One temporary sign not exceeding six square feet provided the sign is removed within fifteen days from the sale, lease or rental of the property or within seven days of completion of any construction or remodeling. An additional sign of the same size may be erected if the property borders a second street and the signs are not visible simultaneously. On tracts of land of more than 2 acres in residential zones the sign area may be increased to 32 square

> feet. In no case shall the sign or signs be erected for more than twelve (12) months.
>
> c. One temporary sign not exceeding four square feet in area which is erected for a maximum of eight days in any calendar month and is removed by sunset on any day it is erected.
>
> d. Temporary signs erected within a building which do not obstruct more than 10 percent of any individual window surface.

(Emphasis added).

Plaintiffs challenge Sections 47.08.300(B)(1)(a) and (b) on the basis that they restrict temporary signs connected to elections and to the sale, lease, rental, construction, or remodeling of property. Likewise, they challenge similar provisions in Section 47.08.300(B)(2) applicable to commercial or industrial zones. For instance, plaintiffs argue that the provisions restrict the display of temporary election signs in residential, commercial, and industrial zones both in terms of sign size and the time within which such messages may be displayed. Plaintiffs assert that such restrictions could only be applied once an enforcement officer ascertains that the signs pertain to election issues, thus demonstrating that the restrictions are content-based.

The City responds that the provisions at issue do not limit themselves to election signs or signs about property leasing, remodeling, etc. Instead, the City characterizes the provisions as allowing for additional signage, regardless of content, during certain time periods or when

property is put to a particular use. For instance, during an election season, or while a contractor is remodeling a house, the relaxed signage rules apply regardless of whether a sign suggests anything about elections or advertises a remodeling contractor's business. Plaintiffs characterize this interpretation as "bizarre," but it is a fair reading of the provisions and demonstrates the lengths to which the City has gone to regulate signs without doing so on the basis of content.

The City defends one other temporary sign provision, in the context of commercial or industrial zones, on the same basis. That provision states:

> Temporary non-illuminated signs not exceeding 16 square feet *for charitable fundraising events* placed by nonprofit and charitable organizations. Such signs shall not be placed more than seven days prior to the event and must be removed within two days following the event. No more than three such events shall be advertised in this manner per lot per year.

LOC 47.08.305(B)(2)(C)) (emphasis added).

Unfortunately for the City, it did not follow the same model with this provision as it did with the other portions of Section 47.08.305. In this instance, the City has made a special allowance for increased signage "for charitable fundraising events," thus making a special exception for certain sign content. In other words, there is no way to read this provision as allowing any type of content on signs up to 16 square feet around the time a charitable fundraising event is taking place.

3. *Construction and design standards for permanent signs*

In reviewing plaintiffs' arguments, the only other provision of the Sign Code that strikes me as potentially content-based is Section 47.06.200(5): "Copy on signs visible from streets shall be designed to reduce distractions to motorists. Signs may be reviewed for clarity and readability."

Defendants offer a construction of the provision to prevent it from being construed as content-based. Namely, they argue that the provision can be read "to refer to the visibility of the sign not the intelligibility of its message." Defendants' Memorandum In Opposition to Plaintiffs' Motion for Partial Summary Judgment, p. 14. Although it is a close call, I find defendants' construction to be fair and conclude that the provision does not open the door for the City to determine a sign's message. The latitude provided to City officials by the provision is limited to ensuring that the appearance of a sign does not provide a distraction to drivers.

C. *The constitutionality of the content-based provisions*

Now that I have identified which provisions of the Sign Code are content-based, the issue becomes whether they are constitutional. To begin this analysis, I first summarize the provisions of the Sign Code that I have found to be content-based:

- The exemption from fee, permit, and application requirements for permanent signs that are "danger signs," "official notices," and "no solicitation" signs.

- The allowance of temporary signs in commercial or industrial zones, without a permit, "for charitable fundraising events."

Content-based sign regulations on non-commercial speech are presumptively unconstitutional. *Foti,* 146 F.3d at 637 (citing *R.A.V.,* 505 U.S. at 382). To pass constitutional muster, they must survive strict scrutiny. *Boos v. Barry,* 485 U.S. 312, 321-22 (1988). Strict scrutiny requires the government to show that "the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* Also, the regulation must use the least restrictive means to further the articulated compelling interest. *Foti,* 146 F.3d at 636 (citing *Sable Communs. of California v. F.C.C.,* 492 U.S. 115, 126 (1989)).

Because the City, in its written and oral arguments, maintained that the Sign Code was a content-neutral ordinance, it did not provide argument or evidence to support a finding that the specific provisions identified above could satisfy strict scrutiny. Regardless, with the possible exception of "danger signs," I find it doubtful that the City could demonstrate that the content-based provisions of the Sign Code meet such a high standard. As such, I find the provisions to be unconstitutional.

Such a *de minimus* portion of the Sign Code, however, does not require that the Sign Code be voided *in toto,* as plaintiffs request. Instead, the offending provisions shall be severed,[4] as allowed by Section 10.02.050 of the Sign Code and state law under ORS 174.040, which provides:

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[4] As noted at the end of the Opinion, the parties shall have three weeks to submit a proposed form of judgment. As part of that process,

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> It shall be considered that it is the legislative intent, in the enactment of any statute, that if any part of the statute is held unconstitutional, the remaining parts shall remain in force unless:
>
> (1) The statute provides otherwise;
>
> (2) The remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the remaining parts would not have been enacted without the unconstitutional part; or
>
> (3) The remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent.

The stricken portions of the Sign Code are minor exemptions or exceptions to major portions of the Sign Code (e.g., regulations governing temporary signs). The remaining parts of the Sign Code are not dependent on the stricken portions and can be executed effectively without them. These conclusions are further bolstered by the fact that, as explained below, I find no other constitutional infirmities in the Sign Code that warrant the severance of additional provisions.

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the City is welcome to propose alternatives to severing the offending provisions of the Sign Code, such as textual modifications that resolve the constitutional infirmities identified in this Opinion. For instance, it is plausible that the City could re-write the current exemption applicable to charitable fundraising events by following the non-content-based approach it uses in the context of temporary signs during an election season.

D. *The constitutionality of the content-neutral provisions*

In the event that the government's restriction on speech is determined to be content-neutral, the government may permissibly impose reasonable time, place, and manner requirements on speech. Such requirements are valid if the government can show that (1) they are narrowly tailored to serve a substantial governmental interest; and (2) they leave open ample alternative channels for communication of the information. *Ward,* 491 U.S. at 791. Under this time, place, and manner analysis, a narrowly tailored regulation does not have to eliminate all less restrictive alternatives, but must not burden substantially more speech than is necessary to further the government's legitimate interest. *Id.* at 799.

The City argues that these standards are satisfied, both for the specific Sign Code provisions challenged by plaintiffs and for the Sign Code as a whole. In support of this argument, the City emphasizes the interests served by the Sign Code as set forth in Section 47.03.010, which states in relevant part:

> The City Council finds that to protect the health, safety, property and welfare of the public, to provide the neat, clean, orderly and attractive appearance of the community, to improve the effectiveness of signs, to provide for safe construction, location, erection, and maintenance of signs, to prevent proliferation of signs and sign clutter, and to minimize adverse visual safety factors to travelers on public highways and on private areas open to public travel, it is necessary to regulate the design, quality of materials, construction, location, electrification, illumination and maintenance of signs visible from public

property, public rights-of-way and private areas open to public vehicular travel.

The courts have consistently been willing to accept, as substantial government interests, the types of concerns arising from signs and billboards as articulated in the Sign Code. *See Nat'l Adver.*, 861 F.2d at 249 ("Under *Metromedia v. City of San Diego*, 453 U.S. 490 (1981) ], the City's interests in traffic safety and aesthetics are sufficient to justify continued content-neutral regulation of the non-communicative aspects of billboards, such as size, spacing and design."); *see also Outdoor Sys.*, 997 F.2d at 611 (finding it "obvious" that the aesthetic and safety goals of a sign ordinance represented substantial governmental interests). Based on this precedent and my review of the Sign Code, I fail to see how the challenged provisions of the Sign Code are not narrowly tailored to serve substantial government interests or do not leave open ample alternative channels of communication. This conclusion takes into consideration the City's ban on most pole signs, discussed below, which plaintiffs point to as proof that ample alternative channels are not available.

Based on the foregoing, summary judgment is granted against plaintiffs' tenth and twelfth claims for relief.[5] In regard to plaintiffs' eighth and ninth claims for relief, in which plaintiffs allege that the Sign Code is facially unconstitutional because it regulates non-commercial speech on the basis of content or viewpoint, summary judgment is granted in plaintiffs' favor solely to the extent

[5] Plaintiffs' twelfth claim for relief alleges that certain provisions of the Sign Code prefer commercial over non-commercial speech. Plaintiffs do not develop this argument in their briefs and I otherwise do not find such a preference in the Sign Code.

that certain provisions of the Sign Code, as specified above, shall be severed. In all other respects, summary judgment is granted on those claims in defendants' favor.

### E. *Does the Sign Code constitute an unconstitutional prior restraint of speech?*

In addition to challenging the constitutionality of provisions of the Sign Code on the basis that they are content-based, plaintiffs also argue that the provisions requiring a permit before erecting certain signs constitute an unconstitutional system of prior restraint on speech. Plaintiffs advance two theories to support their argument: (1) the Sign Code lacks adequate procedural safeguards; and (2) the Sign Code gives city officials unbridled discretion in approving or denying signs.

#### 1. *Does the Sign Code contain adequate procedural safeguards?*

Plaintiffs argue that the Sign Code lacks adequate procedural safeguards. In particular, plaintiffs take issue with the process available to a party after the City denies an application for a sign permit. Relying on *Freedman v. Maryland,* 380 U.S. 51 (1965), plaintiffs argue that the Sign Code is unconstitutional because it does not provide for prompt judicial review of an adverse permit decision by the City.

The City responds that *Freedman* is inapplicable, given the Supreme Court's more recent decision in *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002). In *Thomas,* the Court held that procedural safeguards required by *Freedman* do not apply to a content-neutral time, place, and manner permitting scheme. *Id.* at 322. In response,

plaintiffs reiterate their argument that the Sign Code is riddled with content-based provisions.

As explained above, I have found only a few provisions in the Sign Code to be content-based. Significantly, the provisions that I have found to be content-based are in portions of the Sign Code that expressly provide exceptions to the requirement that a sign permit must be obtained. Because the Sign Code is a content-neutral time, place, and manner permitting scheme, I find plaintiffs' arguments to be misplaced. Summary judgment is granted against plaintiffs' thirteenth claim for relief.

2. *Does the Sign Code provide unbridled discretion?*

Plaintiffs also assert that the permitting scheme included in the Sign Code is constitutionally infirm because it vests city officials with too much discretion to approve or deny signs and sign permits. The first provision that plaintiffs take issue with is Section 47.08 .305, which governs temporary signs requiring a permit. The relevant portions from that regulation state:

> The City Manager may allow temporary signs larger than those allowed by 47.08.300 to be erected. *This signage shall not be restricted by content,* but is usually and customarily used to advertise special events and store openings on banners. The City Manager shall allow the erection of such signs only if the City Manager finds that the proposed sign will not materially impair the purposes of the Sign Code expressed in LOC 47.03.010.
>
> Seasonal decorations erected within the public right-of-way shall be considered to be such signs.

> These signs shall meet all applicable City Code provisions. Lighting of such signs will be reviewed as part of the application and may be allowed depending on impact to surrounding development.

LOC 47.08.305(1) (emphasis added).

> The extent of signage allowed and the location of the signage is at the discretion of the City Manager.

LOC 47.08.305(3).

Plaintiffs' primary complaint about these provisions is that they rely on Section 47.03.010 to provide guidance to the City Manager in deciding whether to allow the erection of larger, temporary signs than allowed under Section 47.08.300. Section 47.03.010 is quoted in full above and expresses the purposes of the Sign Code, such as protecting aesthetics and safe traffic circulation, but does not otherwise set forth objective criteria for whether a sign should be approved or not.

The other primary provision that plaintiffs take issue with is Section 47.06.200(4), which is part of the construction and design standards for permanent signs. That section states:

> Signs shall be designed to be compatible with other nearby signs, other elements of street and site furniture and with adjacent structures. Compatibility shall be determined by the relationships of the elements of form, proportion, scale, color, materials, surface treatment, overall sign size and the size and style of lettering.

LOC 47.06.200(4).

The Ninth Circuit has stated that "a law cannot condition free exercise of First Amendment rights on the 'unbridled discretion' of government officials." *Desert Outdoor Adver.*, 103 F.3d at 818 (citation omitted). "[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). The danger is that absent standards controlling the exercise of discretion, government officials may determine "who may speak and who may not based upon the content of the speech or viewpoint of the speaker." *City of Lakewood*, 486 U.S. at 763-64.

As made clear in *City of Lakewood*, the requirement of sufficiently definite standards is the mechanism used by the courts to ensure that licensing officials do not allow sign content or viewpoint to affect their decisions. Consistent with my conclusions above regarding other provisions in the Sign Code that allow temporary signs without a permit, I fail to see how the authority vested in the City Manager to permit larger temporary signs opens the door to content or viewpoint regulation. Section 47.08.305(1) explicitly states that such signs "shall not be restricted by content," a factor recently relied upon by the Ninth Circuit to find that an Oregon statute regulating billboards did not provide unbridled discretion to state officials in granting or denying variances. *Lombardo v. Warner*, 353 F.3d 774, 778 (9th Cir.2003).[6] The design factors set forth in

[6] I acknowledge plaintiffs' argument that this opinion is not binding authority because a petition for rehearing *en banc* has been filed in the case, but I find those arguments to be unpersuasive. *See Hart v. Massanari*, 266 F.3d 1155, 1170-71 (9th Cir.2001) ("Once a panel resolves an issue in a precedential opinion, the matter is deemed

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Section 47.06.200(4) also clearly regulate the appearance of signs, rather than their content or the viewpoint expressed.[7] As such, I conclude the Sign Code is not an unconstitutional prior restraint based on unbridled discretion vested in City officials and summary judgment is granted against plaintiffs' fourteenth claim for relief.

F. *Disposition of plaintiffs' remaining facial challenges under the First Amendment*

As noted above, plaintiffs seek summary judgment on all of their facial challenges to the Sign Code under the First Amendment other than claims eleven and seventeen. The above discussion takes into consideration the arguments raised by plaintiffs in support of their motion for partial summary judgment. However, because defendants seek summary judgment against *all* of plaintiffs' facial challenges under the First Amendment, I must still resolve those claims not fully addressed in conjunction with plaintiffs' motion.

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resolved, unless overturned by the court itself sitting *en banc*, or by the Supreme Court.").

[7] In addition to finding that the provisions challenged by plaintiffs do not lend themselves to content or viewpoint discrimination, I also note that the Supreme Court has recently raised the bar regarding claims of "unbridled discretion," particularly when brought as facial challenges to content-neutral time, place, and manner restrictions:

> Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional, but we think that this abuse must be dealt with if and when a pattern of unlawful favoritism appears, rather than by insisting upon a degree of rigidity that is found in few legal arrangements.

*Thomas*, 534 U.S. at 325.

1. *Eleventh claim for relief*

In their eleventh claim for relief, plaintiffs allege that provisions of the Sign Code are facially unreasonable time, place, or manner regulations. In other words, plaintiffs argue that portions of the Sign Code, even if content-neutral, do not pass constitutional muster.

In their First Amended Complaint, plaintiffs specifically cite Sections 47.04.115 (variances) and 47.12.500 (prohibited signs) of the Sign Code as being in violation of the standards that govern content-neutral time, place, and manner restrictions on speech. *See Ward, supra* (restrictions must be narrowly tailored to serve a substantial governmental interest, leave open ample alternative channels for communication of the information, and not burden substantially more speech than is necessary to further the government's legitimate interests).

Based on how plaintiffs pleaded their eleventh claim, defendants address Sections 47.12.500 and 47.04.115 in their memorandum in support of their motion for summary judgment and explain why they meet constitutional standards or argue that such standards are inapplicable. Plaintiffs, however, never refute those arguments. This fact, combined with my earlier review of the constitutionality of these content-neutral provisions, lead me to grant summary judgment in defendants' favor on plaintiffs' eleventh claim for relief.

2. *Sixteenth and seventeenth claims for relief*

In their sixteenth claim for relief, plaintiffs allege that the Sign Code is facially overbroad in its regulation of speech, but do not specify any particular offending provisions. In their seventeenth claim for relief, plaintiffs allege

that the Sign Code is unconstitutionally vague. Defendants move against these claims and take pains to address the numerous enumerated sections of the Sign Code that plaintiffs allege are unconstitutionally vague.

Again, plaintiffs do not respond to defendants' arguments. Furthermore, I have already reviewed many of the provisions challenged by plaintiffs as vague and my extensive review of the Sign Code leads me to reject plaintiffs' rather amorphous and redundant overbreadth claim. Summary judgment is granted against plaintiffs' sixteenth and seventeenth claims for relief.

## III. *As-Applied Challenges to the Sign Code under the First Amendment*

I now turn to the issue of whether plaintiffs have valid constitutional challenges based on how the Sign Code has been applied to them.[8] In their first and second claims for relief, plaintiffs assert that the City's enforcement of the Sign Code against plaintiffs, due to their pole sign, does not meet constitutional standards. Specifically, they assert that the triggering mechanism that requires them to bring their sign into compliance or remove it is an unconstitutional content-based restriction on speech. In their third and fourth claims for relief, plaintiffs allege that provisions in the Sign Code deprive them and others of the right to free expression through the medium of pole signs.

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[8] As an initial matter, I note that I treat plaintiffs' pole sign as a "non-conforming" sign (plaintiffs' characterization) rather than an "illegal" sign (defendants' characterization), mostly due to the fact that summary judgment is clearly warranted even if the sign is treated as non-conforming.

As to plaintiffs' first theory, it deserves only short shrift here given my conclusion above that provisions in the Sign Code that require a sign be brought into compliance upon a change of copy or alteration (e.g., Section 47.04.100(1)) are not content-based and are constitutional time, place, and manner restrictions.

I also find plaintiffs' second theory, that the Sign Code impermissibly bans a medium of speech used by plaintiffs, untenable. First, I note that the Sign Code does not actually ban pole signs, at least in the general commercial zone in which plaintiffs' pole sign is located. The section of the Sign Code applicable to plaintiffs' pole sign is Section 47.10.410(1)(D), which states:

> *Sign Types:* Monument signs shall be allowed. Pole signs shall only be allowed when necessary to provide vision clearance at driveways or intersections and when there is no alternative, visible on-building or monument sign location. No pole signs shall be allowed in the OC/R-2.5, OC/NC and R-2.5/W zones.

(Formatting in original).

Defendants assert, and plaintiffs do not counter, that plaintiffs did not make the requisite showing pursuant to this code section when they applied for a sign permit and variance for their pole sign.

Second, I do not subscribe to plaintiffs' characterization of pole signs as a medium of speech protected by the First Amendment. One type of signs is simply not comparable to entire media such as pamphlets, handbills, and billboards that have warranted protection by the courts. Plaintiffs cite to *City of Ladue v. Gilleo,* 512 U.S. 43 (1994), to support their argument, but the facts of that

case involved a near-total ban of signs in residential areas. Moreover, the Court in that case made clear that "[i]t is common ground that governments may regulate the physical characteristics of signs," just as the City is doing vis-a-vis pole signs. *Id.* at 48.

Along these lines, a regulation banning one type of sign – especially when an exception exists to allow that type of sign when there is no adequate alternative – while allowing numerous other sign types (e.g., wall signs, monument signs), is narrowly tailored and leaves open ample, alternative channels of communication. Summary judgment is granted against plaintiffs' as-applied constitutional challenges to the Sign Code as set forth in their first four claims for relief.[9]

## IV. *Remaining Claims (Non-First Amendment Claims)*

As noted above, plaintiffs assert four claims in addition to their facial and as-applied claims under the First Amendment.

### A. *Claim Five*

In claim five, plaintiffs allege that they were denied equal protection under the law because of selective enforcement of the Sign Code based on race. In their memorandum in opposition to defendants' motion for summary judgment, plaintiffs state that they have decided to not

[9] Because of my rulings on the merits, I do not reach defendants' argument that plaintiffs' fourth claim for relief is premature (for lack of damages). Likewise, because I reject plaintiffs' first claim for relief on the merits, I do not address any issues related to damages to support that claim.

pursue this claim and ask that it be dismissed. Summary judgment (and dismissal with prejudice) is granted against plaintiffs' fifth claim for relief.

B. *Claims Six and Seven*

In their sixth claim for relief, plaintiffs seek just compensation because defendants, through the Sign Code, "are taking, or will take, all of the value of [plaintiffs' pole sign] by requiring its removal." First Amended Complaint, ¶ 65. In their motion for summary judgment, defendants respond that this claim is premature because the pole sign still stands and, accordingly, plaintiffs have not been damaged. Defendants also argue that plaintiffs have not exhausted their state remedies before bringing this claim in federal court. Plaintiffs counter with a tenuous argument that they have, in fact, incurred damages in the form of out-of-pocket expenditures for fees associated with sign permit and variance applications and a $100 fine in response to the citation by the City.

Given that the pole sign has not yet been removed, any losses incurred by plaintiffs do not relate to the removal of the sign, and it appears that plaintiffs have additional state procedures to exhaust for seeking just compensation, I grant summary judgment against plaintiffs' sixth claim for relief.

Plaintiffs' seventh claim for relief is similar to their sixth claim in that it attacks the amortization provisions in the Sign Code that will require removal of the pole sign in the near future. Those provisions require that non-conforming signs, such as plaintiffs' pole sign, be brought into compliance by May 21, 2004. LOC 47.04.100(5), 47.04.102(1). Plaintiffs ask the court to strike the amortization scheme as facially

unconstitutional because the Sign Code "contains no provisions for the payment of just compensation or allowing sign owners a notice and opportunity to be heard on the issue of the value of speech lost as a result of the forced removal of existing signs." First Amended Complaint, ¶ 73.

Defendants raise three arguments against this claim. Specifically, they argue that (1) the claim is not ripe because plaintiffs have not exhausted their state remedies; (2) the amortization period allowed by the Sign Code is reasonable based on case law; and (3) the claim is time-barred by the applicable statute of limitations because it accrued at the time of the adoption of the amortization provisions in 1994 and 1997. Plaintiffs attempt to refute the argument that the claim is time-barred but, significantly, do not challenge defendants' assertion that plaintiffs have not exhausted their state remedies. Indeed, given that plaintiffs' facial challenge is premised on the Sign Code denying plaintiffs the economically viable use of their sign, they must exhaust all state procedures before bringing this type of facial challenge in federal court. *Sinclair Oil Corp. v. County of Santa Barbara,* 96 F.3d 401, 406-07 (9th Cir.1996), *cert. denied,* 523 U.S. 1059 (1998) ("[E]ven if a zoning ordinance, on its face, 'takes' property for Fifth Amendment purposes, no constitutional violation occurs until the state refuses to justly compensate the property owner."). Summary judgment is granted against plaintiffs' seventh claim for relief.

C. *Claim Fifteen*

In claim fifteen, plaintiffs bring an equal protection challenge against the Sign Code on the basis that, on its

face, it unconstitutionally discriminates between similarly situated persons. Specifically, plaintiffs cite the following sections of the Sign Code: 47 04.100, 47.04.102, and 47.08.300. These provisions set forth the treatment of non-conforming and unlawful signs, and address temporary signs exempt from fee, application, and permit requirements.

In moving for summary judgment against this claim, defendants argue that it is time-barred by the applicable statute of limitations because it accrued at the time of the adoption of the Sign Code in 1994. As defendants succinctly state: "If the code facially discriminates, it did so starting in 1994." Defendants' Memorandum In Support of Motion for Summary Judgment, pp. 18-19. Plaintiffs do not challenge this argument. Moreover, the applicable statute of limitations is two years, thus rendering plaintiffs' claim untimely. *Bibeau v. Pac. N.W. Res. Found. Inc.*, 188 F.3d 1105, 1108 (9th Cir.1999), *modified* 208 F.3d 831 (9th Cir.2000) (statute of limitations in Oregon for Section 1983 actions is two years). Summary judgment is granted against plaintiffs' fifteenth claim for relief.

## V. *Rulings on Remaining Issues*

### A. *Immunity of Defendant Ingalls*

Defendants assert that defendant Ingalls is entitled to absolute or qualified immunity against plaintiffs' claims for damages (i.e., plaintiffs' first, fourth, fifth and sixth claims for relief). Although defendants' arguments regarding qualified immunity are well taken, I do not need to reach this issue given that I have concluded that summary judgment is appropriate against all of plaintiffs' claims for damages.

The required first step in a qualified immunity analysis "is to consider the materials submitted in support of, and in opposition to, summary judgment, in order to decide whether a constitutional right would be violated if all facts are viewed in favor of the party opposing summary judgment." *Jeffers v. Gomez,* 267 F.3d 895, 909 (9th Cir.2001) (citing *Saucier v. Katz,* 533 U.S. 194, 201 (2001)). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Saucier,* 533 U.S. at 201.

Plaintiffs' claims against Ingalls are premised on her enforcing unconstitutional, content-based provisions of the Sign Code that require plaintiffs to remove their sign pole. As I have concluded above, the provisions enforced by Ingalls are not content-based and are constitutional. The few terms in the Sign Code that I have deemed to be content-based and unconstitutional were not at issue in Ingalls' enforcement of the Sign Code against plaintiffs.

B. *Standing of Plaintiffs Gillison and Kusudo*

Defendants argue that summary judgment on claims eight through seventeen (plaintiffs' facial challenges to the Sign Code) should be granted against plaintiffs W.H. Gillison and Kathleen Kusudo because they do not have standing independent from their status as owners of the corporate plaintiff, GK. Plaintiffs counter that Gillison and Kusudo have standing to seek declaratory and injunctive relief because they are citizens of the City of Lake Oswego and their rights to free speech have been chilled by the Sign Code. Although it appears that Gillison and Kusudo pleaded standing only on the basis of being owners of GK,

I decline to rule on this issue given that I have already granted summary judgment against claims eight through seventeen.

## CONCLUSION

Based on the foregoing, full summary judgment is warranted against all of plaintiffs' claims for relief, with the exception of portions of plaintiffs' eighth and ninth claims for relief. On those claims, in which plaintiffs allege that the Sign Code is facially unconstitutional because it regulates non-commercial speech on the basis of content or viewpoint, summary judgment is granted in plaintiffs' favor solely to the extent that certain provisions of the Sign Code, as specified above, shall be severed. Accordingly, defendants' motion for summary judgment (# 38) is GRANTED IN PART and DENIED IN PART. Plaintiffs' motion for partial summary judgment (# 43) is GRANTED IN PART and DENIED IN PART.

The parties shall confer and, if possible, jointly submit a proposed form of judgment (and related stipulations, if any) within three weeks from the date of this Opinion. If the parties are unable to agree on the form of judgment, each party may submit a proposed judgment within three weeks. Objections to a proposed judgment shall be filed no later than one week thereafter.

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**APPENDIX C**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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|---|---|
| G.K. LTD. TRAVEL, an Oregon corporation; WH GILLISON; RAMSAY SIGNS, INC., an Oregon corporation; KATHLEEN KUSUDO,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>CITY OF LAKE OSWEGO; SANDY INGALLS,<br><br>Defendants-Appellees. | No. 04-35416<br><br>D.C. No. CV-02-01147-GMK<br>District of Oregon,<br>Portland<br>ORDER<br><br>(Filed Mar. 15, 2006) |

Before: FISHER, GOULD and BEA, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed R. App. P. 35.

Appellants' petition for panel rehearing and petition for rehearing en banc, filed February 16, 2006, is **DENIED**.

# APPENDIX D

## Constitution of the United States of America
## Amendment I

Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

# APPENDIX E

## EXHIBIT 5

## CHAPTER 47 SIGN CODE

Articles:


| | |
|---|---|
| 47.02 | Repealed. |
| 47.03 | In General. |
| 47.04 | Non-Conforming, Exempt and Prohibited Signs Generally and Unlawful Signs in the EC Zone. |
| 47.06 | Regulation of Permanent Signs. |
| 47.08 | Regulation of Temporary Signs. |
| 47.10 | Permit Requirements. |
| 47.12 | Variances. |


Article 47.02

Repealed.

Sections:

| | | |
|---|---|---|
| 47.02.005 | Repealed. | Ord. No. 2085, 01/04/94. |
| 47.02.010 | Repealed. | |
| 47.02.015 | Repealed. | Ord. No. 2085, 01/04/94. |
| 47.02.020 | Repealed. | Ord. No, 2085, 01/04/94. |
| 47.02.025 | Repealed. | Ord. No. 2085, 01/04/94 |
| 47.02.030 | Repealed. | Ord. No. 2085, 01/04/94. |
| 47.02.035 | Repealed. | Ord. No. 2085, 01/04/94. |
| 47.02.040 | Repealed. | Ord. No. 1921, 07/02/85. |
| 47.02.050 | Repealed. | Ord. No. 1921, 07-02-85. |

| | | |
|---|---|---|
| 47.02.060 | Repealed. 07/02/85. | Ord. No. 1921, |
| 47.02.070 | Repealed. 07/02/85. | Ord. No. 1921, |
| 47.08.080 | Repealed. 07/02/85. | Ord. No. 1921, |
| 47.02.090 | Repealed. 07/02/85. | Ord. No. 1921, |
| 47.02.100 | Repealed. 01/04/94. | Ord. No. 2085, |
| 47.02.105 | Repealed. 01/04/94. | Ord. No. 2085, |
| 47.02.110 | Repealed. 01/04/94. | Ord. No. 2085, |
| 47.02.115 | Repealed. 01/04/94. | Ord. No. 2085, |
| 47.02.120 | Repealed. 01/04/94. | Ord. No. 2085, |
| 47.02.125 | Repealed. 01/04/94. | Ord. No. 2085, |
| 47.02.130 | Repealed. 01/04/94. | Ord. No. 2085, |
| 47.02.135 | Repealed. 01/04/94. | Ord. No. 2085, |
| 47.02.140 | Repealed. 01/04/94. | Ord. No. 2085, |
| 47.02.145 | Repealed. 01/04/94. | Ord. No. 2085, |
| 47.02.150 | Repealed. 01/04/94. | Ord. No. 2085, |
| 47.02.160 | Repealed. 07/02/85. | Ord. No. 1921, |
| 47.02.170 | Repealed. 07/02/85. | Ord. No. 1921, |
| 47.02.180 | Repealed. 07/02/85. | Ord. No. 1921, |
| 47.02.190 | Repealed. 07/02/85. | Ord. No. 1921, |

| | | |
|---|---|---|
| 47.02.200 | Repealed. | Ord. No. 2085, |
| | 01/04/94. | |
| 47.02.210 | through 47.02.070. | Repealed |
| | Ord. No. 1921, | 07/02/85. |
| 47.02.005 | Repealed. | Ord. No. 2085, |
| | 01/04/94. | |
| 47.02.010 | Repealed. | Ord. No. 2085, |
| 47.02.015 | Repealed. | Ord. No. 2085, |
| | 01/04/94. | |
| 47.02.020 | Repealed. | Ord. No. 2085, |
| | 01/04/94. | |
| 47.02.025 | Repealed. | Ord. No. 2085, |
| | 01/04/94. | |
| 47.02.030 | Repealed. | Ord. No. 2085, |
| | 01/04/94. | |
| 47.02.035 | Repealed. | Ord. No. 2085, |
| | 01/04/94. | |
| 47.02.040 | Repealed. | Ord. No. 1921, |
| | 07/02/85. | |
| 47.02.050 | Repealed. | Ord. No. 1921, |
| | 07/02/85. | |
| 47.02.060 | Repealed. | Ord. No. 1921, |
| | 07/02/85. | |
| 47.02.070 | Repealed. | Ord. No. 1921, |
| | 07/02/85. | |
| 47.02.080 | Repealed. | Ord. No. 1921, |
| | 07/02/85. | |
| 47.02.090 | Repealed. | Ord. No. 1921, |
| | 07/02/85. | |
| 47.02.100 | Repealed. | Ord. No. 2085, |
| | 01/04/94. | |
| 47.02.105 | Repealed. | Ord. No. 2085, |
| | 01/04/94. | |
| 47.02.110 | Repealed. | Ord. No. 2085, |
| | 01/04/94. | |
| 47.02.115 | Repealed. | Ord. No. 2085, |
| | 01/04/94. | |

| | | |
|---|---|---|
| 47.02.120 | Repealed. 01/04/94. | Ord. No. 2085, |
| 47.02.125 | Repealed. 01/04/94. | Ord. No. 2085, |
| 47.02.130 | Repealed. 01/04/94. | Ord. No. 2085, |
| 47.02.135 | Repealed. 01/04/94. | Ord. No. 2085, |
| 47.02.140 | Repealed. 01/04/94. | Ord. No. 2085, |
| 47.02.145 | Repealed. 01/04/94. | Ord. No. 2085, |
| 47.02.150 | Repealed. 01/04/94. | Ord. No. 2085, |
| 47.02.160 | Repealed. 07/02/85. | Ord. No. 1921, |
| 47.02.170 | Repealed. 07/02/85. | Ord. No. 1921, |
| 47.02.180 | Repealed. 07/02/85. | Ord. No. 1921, |
| 47.02.190 | Repealed. 07/02/85. | Ord. No. 1921, |
| 47.02.200 | Repealed. 01/04/94. | Ord. No. 2085, |
| 47.02.210 | through 47.02.970 Ord. No. 1921, | Repealed. 07/02/85. |

**Article 47.03**

**In General.**

**Sections:**


| | |
|---|---|
| 47.03.005 | Title. |
| 47.03.010 | Purpose. |
| 47.03.015 | Definitions. |
| 47.03.025 | Penalties, Nuisance. |
| 47.03.030 | Area of Signs. |

**47.03.005 Title.**

This chapter is entitled "Sign Code of the City of Lake Oswego".

(Ord. No. 1921, Sec. 1; 07-02-85. Ord. No. 2085, Enacted, 04/04/94)

**47.03.010 Purpose.**

The City Council finds that to protect the health, safety, property and welfare of the public, to provide the neat, clean, orderly and attractive appearance of the community, to improve the effectiveness of signs, to provide for safe construction, location, erection, and maintenance of signs, prevent proliferation of signs and sign clutter, and to minimize adverse visual safety factors to travelers on public highways and on private areas open to public travel, it is necessary to regulate the design, quality of materials, construction, location, electrification, illumination and maintenance of signs visible from public property, public rights-of-way and private areas open to public vehicular travel.

This chapter shall be construed to carry out the above-stated purpose, but shall not be construed to permit the erection or maintenance of any sign at any place or in any manner unlawful under any other City Code provisions or other applicable law.

(Ord. No. 789, Sec. 1; 12-05-61. Ord. No. 1921, Sec. 2; 7-02-85. Ord. No. 2085, Enacted, 04/04/94)

**47.03.015 Definitions.**

For the purpose of this chapter certain terms and words are defined as follows: the words "used for" include "designed for" and vice-versa; words used in the present tense include the future, the singular tense include the plural and vice-versa; the word "shall" is always mandatory; the word "may" is discretionary; the masculine gender includes the feminine gender, except as otherwise provided. The definitions in LOC *48.02.015*, and *49.16.015* apply to this chapter to the extent that they do not conflict. The following terms shall mean:

*Abandoned Sign*. A sign associated with the use of a property which has ceased for a period of at least six months.

*Accessory Signs*. Signage which is an integral part of outdoor accessory and display structures or uses allowed by City code.

*Alter*. Any change to a sign excluding change of copy or maintenance – when there is no change of use, or occupancy or ownership.

*Architectural Detail*. Elements of building design commonly used in Lake Oswego building styles, including the Arts and Crafts, English Tudor and the Oregon Rustic Styles. (See photos and descriptions in Lake Oswego Development Standards (LODS) Chapter 23, Appendix C).

*Awning*. A shelter supported entirely from the exterior wall of a building and composed of nonrigid materials except for supporting framework.

*Backlighting, "backlighted", and "backlit"*. Includes cabinet signs, "Channelhume" (plastic lighted letters),

neon lighted letters, and individual letters on awnings and canopies.

*Balloon Signs.* A sign consisting of a membrane that relies on internal gaseous pressure or a semirigid framework for maintaining its form.

*Banners.* Nonrigid material secured or mounted so as to allow movement caused by the wind.

*Blade Sign.* A sign hung from a canopy or awning perpendicular to the direction of pedestrian movement.

*Canopy.* A nonmovable roof-like structure attached to a building.

*Change of Copy.* The change of logo and/or message upon the face or faces of a legal sign.

*Commercial Zones.* Commercial Zones shall mean the CR&D, ED, GC, HC, MC, NC, OC/R-2.5, OC, OC/NC and 4-2.5/W zones as described and established in the Lake Oswego Zoning Code.

*Complex Sign.* A sign which is located at a street intersection or principle access to a multi-building complex.

*Cornice.* A horizontal element in the elevation of a building demarcating the difference between the pedestrian oriented level on street (characterized by entrances, shops, service space, loading areas and lobbies) and office/residential use on levels above.

*Erect.* To build, construct, attach, place, suspend, or affix, including the painting of a wall sign.

*Facing or Surface*. The surface of a sign upon, against, or through which the message is displayed or illustrated.

*Free Standing Sign*. Any ground mounted, pole or monument sign supported by one or more uprights or braces placed upon the ground, and not attached to any building.

*Frontage Business*. A business that has building wall exposure to a street or area open to public travel. Frontage may include streets, alleys, driveways, easements, or parking aisles.

*Indirectly Lighted Sign*. A sign with a source of illumination which is intended to light the sign, but which is not attached to the sign, its trim or support. Interior or exterior lighting which incidentally illuminates the sign is not considered indirect lighting.

*Industrial Zones*. Industrial Zones shall mean the I and IP zones as described and established by the Lake Oswego Zoning Code.

*Maintenance*. The replacing or repairing of a part or portion of a sign made unusable by ordinary wear, or damaged beyond the control of the owner or the replacing of existing copy without changing the composition or color of the copy.

*Monument Sign*. A sign which is affixed to a base which is no more than 30 inches above the nearest ground surface.

*Non-conforming Sign*. Non-conforming signs are those signs which were lawfully installed which do not comply with the requirements of this sign code.

*Overhanging Sign.* A sign which is attached perpendicular to a building wall and hangs out over the public right-of-way or any private area subject to pedestrian travel.

*Pennants.* Strings of small flags.

*Permanent Sign.* Any legally placed sign which is intended to be and is so contructed as to be of a lasting and enduring condition, remaining unchanged in character, condition (beyond normal wear) and position, and in a permanent manner affixed to the ground, wall or building.

*Pole Sign.* A free standing sign erected on one or more supports which are more than 30 inches above the adjacent ground surface.

*Portable Sign.* A temporary sign which is capable of being moved easily and is not permanently affixed to the ground or a structure.

*Public Sign.* A sign erected and maintained by a public agency within the right-of-way of a street or alley.

*Residential Zones.* Residential Zones shall mean the R-0, R-2, R-2.5, R-3, R-5, R-6, R-7.5, R-10, R-15, DD and WR zones as described and established by the Lake Oswego Zoning Code.

*Roof Line.* The ridge on a gable or peaked roof, the parapet or fascia of a flat roof. A mansard roof is considered as a gable roof for the purpose of this definition.

*Roof Sign.* Any sign erected upon or over the roof of any building with the principal sign support on the roof structure.

*Sign.* A device, structure, or fixture which incorporates graphics, symbols, or written copy visible to the public, including those devices, structures or fixtures which are behind windows or building openings, which are intended to communicate information. Graphics, art work and seasonal decorations which do not relate to the use of a site or structure are not considered signs.

*Sign Band.* A continuous painted, attached or structurally internal linear area for the placement of signs extending along one or more sides of a structure located between the windows and the parapet on a one story building with a flat roof and at or below the fascia on a one story building with a pitched roof. On a multistory building it shall be located above the windows and below the second story line.

*Sign Height.* The vertical distance from the lowest point of the adjacent grade below the sign to the highest part of the sign.

*Temporary Sign.* Any sign, banner, pennant, valance or advertising display constructed of cloth, canvas, light fabric, cardboard, wallboard or other like materials, with or without frames, and any other type sign not permanently attached to the ground, or a structure, intended to be displayed for a short period of time only.

*Wall Sign.* A sign attached to, erected against or painted on a wall of a structure, with the exposed face of the sign projecting twelve (12) inches or less, with the exception of awnings and canopies which may project more than twelve (12) inches. Sign bands are not wall signs. Window signs that are permanently attached to the outside of a window are wall signs.

*Wind Sign.* Signage which is an integral part of a device intended to move or operate by the action of the wind such as a wind sock or pin wheel.

(Ord. No. 1921, Sec. 3; 07-02-85. Ord. No 2085, Enacted 01/04/94) (Ord. 2225, Amended, 02/01/2000)

**47.03.025 Penalties, Nuisance.**

1. A person commits a civil violation if they;

A. Fail to comply with or violate any provision of this chapter, or,

B. Develop or maintain a sign contrary to the terms of a sign permit.

2. A sign which fails to comply with or violates any provision of this chapter, or is developed or maintained contrary to the terms of a sign permit is hereby declared to be unlawful and a public nuisance and may be abated by appropriate proceedings.

(Ord. No. 789, Sec. 3; 12-05-61. Ord. No. 841, Sec. 1; 06-19-62. Ord. No. 1921, Sec. 6; 07-02-85. Ord. No. 2085, Enacted, 04/04/94) (Ord. 2225, Amended, 02/01/2000)

**47.03.030 Area of Signs.**

Sign area includes the area within a perimeter enclosing the limits of lettering, writing, representation, emblem, figure, character and lighted surface, but excluding essential sign structure, foundations or supports. For a multiple-face (more than two sided) sign, the sign area shall be the total of all faces. If the sign consists of more than one section or module, all areas will be totaled. For a double-faced sign in a single cabinet, the allowed area

shall be the dimension of the cabinet, not the total of the area of message. See TABLES 47-1 and 47.2.

(Ord. No. 1921, Sec. 7; 07-02-85. Ord. No. 2085, Enacted, 04/04/94.

**Article 47.04**

Non-Conforming, Exempt and Prohibited Signs Generally and Unlawful Signs in the EC Zone.

**Sections:**


| | |
|---|---|
| 47.04.100 | Non-Conforming Signs in all zones, except in the EC Zones. |
| 47.04.102 | Non-Conforming and Unlawful Signs in EC Zone Only. |
| 47.04.105 | Exempt Signs. |
| 47.04.115 | Prohibited Signs. |


47.04.100 Non-Conforming Signs in all zones, except in the EC Zones.

1. A non-conforming sign in all zones other than the EC zone as described and established by the Lake Oswego Zoning Code may be maintained or undergo a change of copy without complying with the requirements of this chapter, with the exception that any change for a new business or use or any changes in a wall sign which is painted on a structure will comply with this chapter at such time as change in copy or alteration occurs.

2. All non-conforming signs are required to meet the provisions of this chapter at such time as the sign is altered, as defined by LOC 47.03.015.

3. Signs installed in violation of any prior Sign Code or applicable laws or regulations, and which are in violation of this chapter, shall be removed, replaced or

altered in order to conform to the requirements of this chapter.

4. Signs recognized as an historical element of a historical landmark are exempt from this chapter.

5. All non-conforming signs shall be altered to conform to the requirements of this chapter by May 21, 2004.

6. A sign for which a variance is granted under the provisions of this chapter is not considered non-conforming.

(Ord. No. 1398, Sec. 1; 09-15-70. Ord. No. 1921, Sec. 5; 07-02-85. Ord. No. 2085, Enacted, 01/04/94) (Ord. 2266, Amended, 09/05/2000; Ord. 2225, Amended, 02/01/2000)

**47.04.102 Non-Conforming and Unlawful Signs in EC Zone Only:**

In the EC zone, as defined and established by the Lake Oswego Zoning Code:

1. Non-conforming signs may continue in use subject to the restrictions in this subsection, but shall be brought into compliance with LOC *47.10.412* by May 21, 2004.

A. A non-conforming sign shall not be:

(1) Modified, unless the modification brings the sign into compliance with this Chapter. A change of copy is allowed, except that any change in a wall sign which is painted on a structure shall comply with LOC *47.10.412*.

(2) Expanded.

(3) Relocated.

B. A non-conforming sign may undergo normal maintenance, except:

(1) "Normal maintenance" excludes major structure repairs designed to extend the useful life of the non-conforming sign.

(2) If a non-conforming sign is damaged by wind, fire, neglect or by any other cause, and such damage exceeds 60% of its replacement value, the non-conforming sign shall be removed.

C. Upon change of use of a business or premise, a non-conforming sign shall be brought into compliance with LOC *47.10.412* within one-hundred-eighty (180) days.

2. Unlawful Signs: A sign is an unlawful sign if it does not conform to the provisions of LOC *47.10.412*, and did not conform to any Sign Code applicable on the date of installation. An unlawful sign shall be removed or made to conform within 60 days after written notice from the Department of Planning. Said 60 day period may be extended if the owner of an unlawful sign submits to the Planning Department a declaration signed under penalty of perjury, on form provided by the Department, stating that he/she intends to terminate the business identified by said sign within twelve (12) months of the date of the notice and agrees to remove the sign upon the expiration of the twelve-month period or the date he/she terminates his/her business, whichever occurs first.

(Ord. 2225, Add, 02/01/2000)

**47.04.105 Exempt Signs.**

All signs, except in the EC zone, which are placed inside a structure or building, which are not visible through windows or building openings and are not intended to be visible to the public are exempt from the provisions of the sign code.

(Ord. No. 2085, Enacted, 01/04/94) (Ord. 2225, Amended, 02/01/2000)

**47.04.115 Prohibited Signs.**

1. No sign, unless exempt or allowed pursuant to this chapter shall be permitted except as may be permitted pursuant to LOC *47.12.500* (Variances).

2. No sign or sign structure shall be allowed that is constructed in such a manner or at such a location that it will obstruct access to any fire escape or other means of ingress or egress from a building or any exit corridor, exit hallway or exit doorway. No sign or supporting structure shall cover, wholly or partially, any window or doorway in any manner that it will substantially limit access to the building in case of fire.

3. In a commercial or industrial zone no sign shall be placed inside or outside a structure so as to obscure more than 25 percent of any individual window surface. In a residential zone no sign shall be placed so as to obscure more than 10 percent of any individual window surface. Glass doors shall be considered an individual window surface.

4. No permanent sign, other than a public sign may be placed within or over any portion of the public right-of-way, except those signs which are consistent with the

provisions of this chapter and which are legally installed in accordance with LOC Chapter 45 (Buildings).

5. No sign shall be allowed within 2 feet of any area subject to vehicular travel.

6. No temporary sign, except for banner signs for which a permit has been issued under LOC *47.08.305* and those necessary for temporary traffic control that comply with LOC *47.08.300*(A)(2)(b) shall be placed within or over any portion of the public right-of-way of a major collector or arterial street.

7. No sign shall be located in a manner which could impede travel on any pedestrian or vehicular travel surface.

8. No temporary signs, bench signs, banners, pennants, wind signs, balloon signs, flags or any other temporary sign structure shall be allowed as except specifically authorized by this Chapter.

9. No sign shall be equipped or displayed with moving, flashing or intermittent illumination except athletic score boards.

10. No sign shall have or consist of any moving, rotating, or otherwise animated part.

11. No signs on buildings shall be placed on the roof or extend above the roof line or parapet of the structure.

12. No sign shall be attached to a tree or vegetation.

13. No non-public sign which purports to be, is an imitation of, or resembles an official traffic sign or signal,

or which attempts to direct the movement of traffic on the street, or which hides from view any official traffic sign or signal shall be permitted.

14. No public address system or sound devices shall be used in conjunction with any sign or advertising device.

15. No signs that are internally illuminated shall be permitted in any residential zone.

16. No sign that obstructs free and clear vision of the traveling public at the intersection of any street or driveway shall be permitted.

(Ord. No. 1921, Sec. 15; 07-02-85. Ord No. 2085, Enacted, 01/04/94) (Ord. 2225, Amended, 02/01/2000)

**Article 47.06**

**Regulation of Permanent Signs.**

**Sections:**

**47.06.200 Construction and Design Standards for Permanent Signs.**

**47.06.205 Permanent Signs Exempt From Permit and Fee.**

**47.06.200 Construction and Design Standards for Permanent Signs.**

1. All permanent signs shall be constructed and erected in accordance with the requirements of the Uniform Sign Code, 1991 Edition.

2. All illuminated signs must be installed by a licensed sign contractor, subject to provisions of the State Electrical Code. All electrically illuminated signs shall bear the Underwriters Laboratory label or equivalent.

3. Building and electrical permits shall be the responsibility of the applicant. Prior to obtaining permits the applicant bears the burden of providing an approved sign permit or demonstrating exemption from the permit requirements of this chapter.

4. Signs shall be designed to be compatible with other nearby signs, other elements of street and site furniture and with adjacent structures. Compatibility shall be determined by the relationships of the elements of form, proportion, scale, color, materials, surface treatment, overall sign size and the size and style of lettering.

5. Copy on signs visible from streets shall be designed to reduce distractions to motorists. Signs may be reviewed for clarity and readability,

(Ord. No. 1921, Sec. 17; 07-02-85. Ord. No. 2085, Enacted, 01/04/94)

### 47.06.205 Permanent Signs Exempt From Permit and Fee.

The following signs shall comply with all provisions and regulations of this chapter. However, no fee, permit or application is required.

1. One sign not exceeding one square foot in area erected on any building within the City.

2. One non-illuminated sign not exceeding two square feet in area placed on any occupied residential lot.

3. Incidental signs not exceeding six square feet in area shall be allowed on any parcel that a Multiple Dwelling (as defined by the Lake Oswego Zoning Code) is constructed, in the industrial, or commercial zone, except

in the EC zone. Incidental signs not exceeding one square foot, with the aggregate areas of less than four square feet, shall be allowed in the EC zone. A freestanding sign may not exceed 60 inches in height. An incidental wall sign may not exceed eight feet in height above grade.

4. Public signs, signs for hospital or emergency services, legal notices, railroad signs, and danger signs.

5. Signs or tablets (including names of buildings, and the date of erection) when cut into any masonry surface, or constructed of bronze or other noncombustible surface not to exceed eight square feet in area.

6. Athletic Field Signs. Rigid signs located on the outfield fence of athletic fields may be installed. Each individual sign shall be no more than 32 square feet in area. There shall be no more than 32 square feet of area for any 8 linear feet of fence. The maximum height shall not exceed 8 feet above grade. The signs shall be placed so as to be visible from the interior of the field and/or viewing stands. One sign located at one end of the field visible to spectators shall have a maximum height of 15 feet above grade and shall be a maximum of 64 square feet.

7. Accessory signs within a commercial or industrial zone which are permanent and an internal part of permitted outdoor accessory or display structures such as soft drink machines, fuel pumps, and newspaper dispensers.

8. Flags displayed from permanently located freestanding or wall-mounted flagpoles which are designed to allow raising and lowering of flags. The number of such flagpoles shall be limited in number to one per site and the maximum height shall be 30 feet.

9. Signs erected within a building which do not obstruct more than 25 percent in a commercial or industrial zone or more than 10 percent in any residential zone of any individual window surface shall be allowed. No such signs shall exceed the maximum square footage as set forth in LOC 47.06.205(3).

10. "No solicitation" sign as permitted pursuant to LOC *34.16 945*.

(Ord. No. 2085, Enacted, 01/04/94)

(Ord. 2225, Amended, 02/01/2000)

**Article 47.08**

**Regulation of Temporary Signs**

**Sections:**

**47.08.300 Temporary Signs, Exempt From Permit and Fee.**

**47.08.305 Temporary Signs Requiring Permit.**

**47.08.300 Temporary Signs Exempt From Permit and Fee.**

The following signs shall comply with all provisions and regulations of this chapter; however, no fee, permit or application is required. Temporary signs are prohibited signs except as provided by this section.

A. Generally,

1. *Illumination*: No temporary sign shall be internally or externally illuminated.

2. *Location*:

a. No temporary sign shall extend into or over the public right-of-way of any street.

b. Signs allowed in the right-of-way for temporary traffic control shall provide a minimum of 5 feet of clear passage for pedestrians on the sidewalk where a sidewalk exists and shall come no closer than 2 feet from areas subject to vehicular travel.

c. No temporary sign shall extend into the vision clearance area.

3. *Maintenance*: Temporary signs shall be kept neat, clean and in good repair. Signs which are faded, torn, damaged or otherwise unsightly or in a state of disrepair shall be immediately repaired or removed.

4. *Placement*: Except as provided by this section, temporary signs shall not be attached to trees, shrubbery, utility poles, or traffic control signs or devices. They shall not obstruct or obscure primary signs on adjacent premises.

5. *Sign Collection and Retrieval*:

a. The City may collect temporary signs placed in the public right of way without a permit.

b. Each sign collected will be stored for a minimum of 30 days.

c. Notice will be mailed within 3 business days of the date of collection to the owner of each sign if the ownership is reasonably discernible from the sign or as previously filed by the owner of the sign with the City Maintenance Department.

d. The owner of a sign may retrieve a sign collected by the City within 30 days of the collection date. The owner must present proof of ownership of the sign and pay a sign retrieval fee in an amount established by resolution of the City Council.

e. The owner of a sign may request a hearing before a Hearing Examiner to contest the sign removal. The City Manager shall designate the Hearings Examiner. To request a hearing, the owner of a sign must file an application for a hearing and pay a hearing fee in an amount established by resolution of the City Council within 15 days of the date of mailing of the notice as provided in subsection (c) above. The hearing fee and the sign retrieval fee are refunded if the Hearing Examiner finds that the sign was removed improperly. At the hearing, testimony and evidence begins with the City, followed by the owner, and concludes with rebuttal by the City. After the evidence has been provided, the Hearing Examiner will close testimony and issue a written decision that states the facts of the case and the conclusions of the decision.

f. Final Decision. The decision of the Hearing Examiner shall be the final decision of the City.

B. Allowed Signage.

1. In any residential zone temporary signage shall be allowed for each and every lot. This signage shall not be restricted by content, but is usually and customarily used to advertise real estate sales, political or ideological positions, garage sales, home construction or remodeling, etc. Signage shall be allowed for each lot as follows:

a. Temporary signs not exceeding six square feet, provided the signs are erected not more than 90 days prior to an election and removed within five days following the election.

b. One temporary sign not exceeding six square feet provided the sign is removed within fifteen days from the sale, lease or rental of the property or within seven days of completion of any construction or remodeling. An additional sign of the same size may be erected if the property borders a second street and the signs are not visible simultaneously. On tracts of land of more than 2 acres in residential zones the sign area may be increased to 32 square feet. In no case shall the sign or signs be erected for more than twelve (12) months.

c. One temporary sign not exceeding four square feet in area which is erected for a maximum of eight days in any calendar month and is removed by sunset on any day it is erected.

d. Temporary signs erected within a building which do not obstruct more than 10 percent of any individual window surface.

2. In any commercial or industrial zone temporary signage shall be allowed for each and every lot. This signage shall not be restricted by content, but is usually and customarily used to advertise real estate signs, political or ideological positions, construction or remodeling, etc. The signage shall be allowed for each lot as follows:

a. Temporary signs not exceeding six square feet, provided the signs are erected not more than 90 days

prior to an election and removed within five days following the election.

b. Temporary sign not exceeding 32 square feet provided said signs are removed within fifteen days from the sale, lease or rental of the property or within seven days of completion of any construction or remodeling. An additional sign of the same size may be erected if the property borders a second street and the signs are not visible simultaneously.

c. Temporary non-illuminated signs not exceeding 16 square feet for charitable fundraising events placed by nonprofit and charitable organizations. Such signs shall not be placed more than seven days prior to the event and must be removed within two days following the event. No more than three such events shall be advertised in this manner per lot per year.

d. Temporary signs not exceeding 16 square feet in area erected in association with the temporary uses allowed by LOC *48.20.510*, including Christmas tree sales, pushcart vendors, Saturday market and sidewalk sales. These provisions shall also apply to fireworks sales authorized by LOC Chapter 15 (Fire Protection). The signage shall be allowed for the same duration as the temporary use.

e. Temporary signs erected within a building which do not obstruct more than 25 percent of any individual window surface.

(Ord. No. 2085, Enacted, 01/04/94)

(Ord. 2225, Amended, 02/01/2000)

**47.08.305 Temporary Signs Requiring Permit.**

1. The City Manager may allow temporary signs larger than those allowed by *47.08.300* to be erected. This signage shall not be restricted by content, but is usually and customarily used to advertise special events and store openings on banners. The City Manager shall allow the erection of such signs only if the City Manager finds that the proposed sign will not materially impair the purposes of the Sign Code expressed in LOC *47.03.010*. Seasonal decorations erected within the public right-of-way shall be considered to be such signs. These signs shall meet all applicable City Code provisions. Lighting of such signs will be reviewed as part of the application and may be allowed depending on impact to surrounding development.

2. The following requirements shall be met, as applicable:

A. Written consent from the property owner where the sign will be located shall be provided. The consent shall identify any restrictions that the property owner requires of the permit holder. Banners hung from utility poles shall require written approval from Portland General Electric. Banners hung over a state highway will require written approval from the Oregon Department of Transportation.

B. Plans or a description showing the location of the sign; banner height above the right-of-way; support devices for the banner; and proposed dates shall be provided.

C. The display period shall not exceed 25 consecutive days in duration and no more than once in any

12 month period. All such signs shall be removed no later than one day following the event being advertised.

D. A copy of any liability and/or property damage insurance required by the property owner where the sign or banner will be located.

E. A signed rebate and indemnity agreement shall be provided if placing a banner over the public right-of-way.

3. The extent of signage allowed and the location of the signage is at the discretion of the City Manager.

(Ord. No. 2085, Enacted, 01/04/94)

**Article 47.10**

**Permit Requirements.**

**Sections:**

**47.10.400 Signs Requiring Permit**

**47.10.405 Permanent Signage Requiring Permit Allowed in Residential Zones (R-0, R-2, R-2.5, R-3, R-5, R-6, R-7.5, R-10, R-15, DD and WR).**

**47.10.410 Permanent Signage Requiring Permit allowed in Commercial Zones (GC, NC, OC/R-2.5, OC/NC, and R-2.5/W).**

**47.10.412 Permanent Signage Requiring Permit Allowed in the EC zone.**

**47.10.415 Permanent Signage Requiring Permit Allowed in Commercial zones (MC, HC, CR & D and OC).**

**47.10.420 Permanent Signage Requiring Permit Allowed in Industrial Zones I and IP.**

**47.10.425 Institutional, Public Facilities or Open Space Land Uses Listed As Conditional Nonconforming Uses.**

**47.10.400 Signs Requiring Permit.**

1. It is unlawful and a civil violation for any person to erect, construct, alter or relocate any sign without first obtaining a permit pursuant to the provisions of this chapter unless a provision of this chapter specifically exempts a sign from the permit requirement.

2. It is unlawful and a civil violation for any person to construct a sign that is not specifically allowed by this chapter or to erect, construct, maintain or allow to exist a sign in violation of the terms of the permit issued pursuant to this chapter.

3. The permit required by this section is a minor development permit. The permit is obtained pursuant to the provisions of LOC Chapter 49 (Development Code) except as those provisions are modified by this chapter. In determining whether the criteria for approval for permit issuance are satisfied the deciding authority shall use the criteria set forth in Subsection 4 of this section and not the criteria set forth in LOC 49.20.110. For an application which is not part of a major development a decision is to be made within 14 days of receipt of a complete application.

4. An application for a sign permit shall include:

A. A completed Sign Permit Application form and fee

B. A Site Plan and/or Building Elevation Plans drawn to scale and dimension showing (as applicable):

Existing Structures
Driveways
Street and Right-of-Way
Existing Signs
Proposed Sign
Vision Clearance (LOC 43.20.530)
All Incidental Signs

C. A proposed sign plan drawn to scale and dimension showing (as applicable):

Height
Width
Square Footage
Thickness
Size and style of letters
Color
Type of illumination
Materials

(Ord. No. 789, Secs. 2, 24-31; 12-05-61. Ord. No. 940, Sec. 1; 07-16-63. Ord. No. 1100, Sec. 1; 03-06-66. Ord. No. 1147, Sec. 1; 12-13-60. Ord. No. 1921, Sec. 13; 07-02-85. Ord. No. 2085, Enacted, 01-04-94)

(Ord. 2231, Amended, 03/21/2000)

**47.10.405 Permanent Signage Requiring Permit Allowed In Residential Zones (R-0, R-2, R-2.5, R-3, R-5, R-6, R-7.5, R-10, R-15, DD and WR).**

In addition to the temporary and permanent signage allowed without permit in the residential zones the following signage is allowed subject to permit and fee.

1. Free-Standing Signs.

A. *Allowable area*: For four or more units or lots, sixteen square feet.

B. *Number*: One sign shall be allowed for the primary frontage. Another sign shall be allowed on any secondary frontage that is 300 feet or more in length.

C. *Height*: The Maximum height shall be six feet.

D. *Sign Types*: Monument or wall (fence) signs.

E. *Illumination*: Only indirect lighting shall be allowed.

2. Signs Attached to Buildings.

A. *Allowable area*: and number provisions for freestanding signs may be transferred to allow signs attached to buildings as an alternative.

B. *Height*: Signs shall be placed no higher than nine feet.

C. *Sign Types*: Signs shall be restricted to wall signs.

D. *Illumination*: Only indirect lighting shall be allowed.

(Ord. No. 2085, Enacted, 01/04/94)

(Ord. 2225, Amended 02/01/2000)

**47.10.410 Permanent Signage Requiring Permit Allowed in Commercial Zones (GC, NC, OC/R-2.5, OC/NC, and R-2.5/W).**

In addition to the temporary and permanent signage allowed without permit in the following commercial zones: GC, NC, OC/R-2.5, OC/NC and R-2.5/W, the following signage is allowed subject to permit and fee,

1. Free Standing Signs.

A. *Allowable Area*: Maximum 32 square feet.

B. *Number*: One sign shall be allowed for the primary frontage. Another sign shall be allowed on any secondary frontage that is 300 feet or more in length.

C. *Height*: Maximum 18 feet for pole signs and 8 feet for monument signs.

D. *Sign Types*: Monument signs shall be allowed. Pole signs shall only be allowed when necessary to provide vision clearance at driveways or intersections and when there is no alternative, visible on-building or monument sign location. No pole signs shall be allowed in the OC/R-2.5, OC/NC and R-2.5/W zones.

2. Sign Attached To Buildings.

A. *Allowable Area*: The 32 square foot maximum allowed for freestanding signs may be transferred to allow signs attached to buildings as an alternative. Except in the OC/R-2.5, OC/NC and R-2.5/W zones, an additional sign or signs shall be allowed within a two foot high horizontal sign band. The sign band length signs may be 75 percent of the building or business frontage whichever is less.

B. *Number*: One 32 square foot sign shall be allowed on each street frontage. The maximum number of signs within the sign band on each street frontage shall equal the number of frontage businesses located on the ground floor.

C. *Height*: The maximum 32 square foot sign shall not be placed higher than 18 feet on any structure. The sign band shall not exceed two feet in height and shall extend along one or more sides of a structure located between the windows and the parapet on a one story building with a flat roof and at or below the fascia on a one story building with a pitched roof. On a multi-story building it shall be located above the windows and below the second story line (retail cornice height).

D. *Sign Types*: Wall signs and sign bands are allowed.

3. Additional Signs Allowed.

A. Awning or canopy signs meeting the same size and number restrictions as sign bands may be substituted for the sign band signs allowed by LOC 47.10.410(2). The awning or canopy may extend over the right-of-way, but shall come no closer than two feet from areas subject to vehicular travel. No such signs shall be allowed in the OC/R-2.5, OC/NC and R-2.5/W zones.

B. Multi-building complexes shall be allowed an additional monument sign of 32 square feet. This sign shall be located at the primary entrance to the complex and shall not extend more than ten feet in height. No such signs shall be allowed in the OC/R-2.5, OC/NC and R-2.5/W zones.

C. Any business which is required by law to post specific signs, such as service stations, shall be allowed up to an additional 22 square feet of signage to communicate the mandated message. The sign may be installed with the primary sign or installed as a separate 5-½ foot tall monument sign. No such signs shall be allowed in the OC/R-2.5, OC/NC and R-2.5/W zones.

D. A theater or movie house with more than one auditorium shall be allowed an additional 48 square feet of signage. No such signs shall be allowed in the OC/R-2.5, OC/NC and R-2.5/W zones.

E. Second story businesses shall be allowed an eight square foot sign erected at the second story level. No tenant signage shall be allowed above the second story. No such signs shall be allowed in the OC/R-2.5, OC/NC and R-2.5/W zones.

F. Blade signs which hang from canopies or awnings over the right-of-way perpendicular to the direction of pedestrian movement shall be allowed, but shall come no closer than 2 feet from areas subject to vehicular travel. The signs shall be consistently 8 inches in height and shall not exceed 6 feet in length. The bottom of the sign shall have 8-½ feet of clearance to the walkway or ground below. One sign shall be allowed for each ground floor tenant. No frontage is required. A blade sign shall be allowed in the OC/R-2.5, OC/NC and R-2.5/W zones only as an alternative to a monument or wall sign.

G. A single overhanging sign may be substituted for the 32 square foot maximum sign. The overhanging sign shall be allowed to overhang the right-of-way provided it is attached to the building, comes no closer than 2 feet from areas subject to vehicular travel, maintains 8-½

feet of clearance to the walkway or ground below and does not extend more than 14 feet above that sidewalk or ground surface. No such signs shall be allowed in the OC/R-2.5, OC/NC and R-2.5/W zones.

4. Sign Features/Restrictions.

A. Signs may be indirectly or directly illuminated.

B. Awning or canopy signs shall only backlight individual letters or graphics. The entire canopy shall not be backlighted.

C. Changeable copy, manual or electronic, shall be allowed for up to 50 percent of any allowed sign.

D. Lighting which is within 200 feet of a residential zone and which is substantially visible from any residential unit or vacant residential lot shall be extinguished between 10:00 P.M. and 8:00 A.M.

(Ord. No. 2085, Enacted, 01/04/44)

(Ord. 2225, Amended, 02/01/2000)

### 47.10.412 Permanent Signage Requiring Permit Allowed In The EC Zone

In addition to the permanent, temporary and exempt signs allowed pursuant to LOC *47.06.205*, *47.08.300* and *47.08.305* the following signage is allowed in the EC zone subject to permit and fee.

1. Permitted Signs.

A. *Blade Signs.*

Blade signs may be hung below roof overhangs, canopies or awnings over public or private pedestrian ways. Such signs shall be uniform in size and placement in relationship to such signs on adjacent buildings, but in no case shall they be larger than 10 inches in height or six feet in length. Lettering shall not exceed six inches in height. Signs shall have a white sign board with dark green, black, dark brown or gold leaf lettering or may be of routed wood.

B. *Cornice Signs.*

Signs of up to 32 square feet in size may be erected on a building within a 2-foot high signage area above the first floor windows and below the retail cornice. Lettering shall not exceed 14 inches in height.

C. *Signs Above the First Floor Cornice.*

One sign per building may be located above the first floor cornice level if:

(1) The sign is composed of individual letters affixed to or molded or carved into the surface material of the building, does not exceed 24 square feet in area, and the lettering does not exceed 14 inches in height; or

(2) The sign projects over the pedestrian way, does not exceed 16 square feet in area, and is designed to fit within a 4 foot x 4 foot square.

D. *Awning Signs.*

A sign consisting of a single row of white or black letters or graphics up to six inches in height shall be allowed on an awning. In addition, a sign 18 inch x 18 inch or smaller graphic symbol or logo shall be allowed on an awning.

E. *Window Signs.*

Signs painted on the glass surface of a window shall be allowed as long as total sign area does not exceed 4 square feet and white or gold lettering is used. More than one such sign is allowed per window as long as the 4 square foot area restriction is not exceeded.

2. Lighting.

A. All signs except for blade signs may be unlit, indirectly lit, or backlit. Awnings and canopy signs shall only backlight individual letters or graphics. The entire canopy shall not be backlighted.

B. Blade signs shall be unlighted or indirectly lighted.

3. Sensitivity to Architectural Detail Required.

Notwithstanding the above provisions or the provisions of this Sign Code, no sign shall be erected in a manner that obscures architectural detail.

4. Modification of Certain Sign Restrictions.

In order to encourage a variety of attractive signs and provide flexibility for property owners, if an applicant elects not to site cornice sign under subsection (1)(B) of this section, he or she may increase the size of a sign

approved pursuant to subsections (1)(D) (awning signs) or (E) (window signs) to the maximum square footage and letter size allowed for cornice signs pursuant to subsection (1)(B) and shall not be subject to any color restrictions otherwise applicable. If an applicant received approval for an window or awning sign under this subsection, he or she may not thereafter receive approval to site a cornice sign unless the window sign or awning sign is first brought into compliance with subsection (1)(D) or (E) of this section.

5. *Sign Maintenance.*

A. All signs, together with all their supports, braces, guys and anchors shall be kept good repair and be maintained in a safe, neat, clean and attractive condition. Signs shall be kept free of rust, corrosion, peeling paint, cracks, fading and other surface deterioration.

B. Illuminated signs shall function properly.

C. Any sign structure or supports that are no longer used shall be removed.

D. Sign Structure shall only be used to support signs. They may not be used to support electrical, telephone, cable or other utility wiring. Exception, collocated telecommunications facilities that meet the requirements of the Zoning Code may be located on an existing sign.

6. Exempt Signs.

The following signs are exempt from the provisions of this section.

A. Interior signs that are of readily visible from any exterior public right-of-way or area open to the public.

B. Interior signs that are located within fifteen feet (15') of the business frontage and are visible from any exterior public right-of-way or from any area open to the public that contain lettering of on inch (1") or less as height and similarly visible interior signs located beyond fifteen feet (15') of the business frontage that contain lettering three inches (3") or less in height. Exception: If the combined amount of all visible interior sign faces exceeds ten (10) square feet, such signs shall be considered "window signs" subject to LOC *47.10.412*(1)(E).

C. A sign that is recognized historic element of an historic landmark.

D. A sign erected by a public agency.

7. Exception to the Requirements of this Sections.

A. The reviewing authority may allow exceptions to this section without the need to obtain a formal variance in one or more of the following circumstances:

(1) The applicant demonstrates that the physical characteristics of the site or existing structure make compliance impractical.

B. A request for exception under this provision may be processed as part of the underlying application or separately as a major development pursuant to LOC Chapter 49.

(Ord. 2225, Add, 02/01/2000)

**47.10.415 Permanent Signage Requiring Permit Allowed in Commercial Zones (MC, HC, CR & D and OC).**

In addition to the temporary and permanent signage allowed without permit in the commercial zones the

following signage is allowed in the MC, HC, CR&D, and OC zones subject to permit and fee.

1. *Free-Standing Signs.*

A. Free-standing complex signs shall be allowed provided that:

(1) The sign is located at the periphery of public street intersections of the complex area defined by Carman Drive, Kruse Way, Bangy Road and Ball Creek; and

(2) The size shall not exceed 40 square feet, except that the maximum sign area may be increased in scale to a maximum of 60 square feet where appropriate for the scale of the complex and visual identity along Bangy Road, Kruse Way, or Carman Drive.

B. Building signs of up to 32 square feet may be located at each major access to a building site. The building sign shall be a monument type sign or shall be placed on the face of a landscape wall, retaining wall, or similar structure. Building signs shall be in addition to tenant signs.

C. Retail development shall be allowed the free-standing signs generally permitted in LOC *47.10.410*(1).

D. Incidental retail tenants (retail tenants located in other than retail buildings or shopping centers, and providing retail services primarily for businesses and employees within the complex) who are dependent on visibility for business shall be allowed one ground mounted for each exposure to vehicular traffic. The incidental retail tenant sign shall be is addition to the signs allowed in LOC 47.10.415(2).

2. *Signs Attached To Buildings.*

A. Wall signs for buildings having exposure to I-5/Hwy 217 shall be allowed as follows:

(1) Hotels shall be allowed one on-building sign for each building elevation (side or face) visible to vehicular traffic on I-5 and Hwy 217. Each hotel shall be allowed a maximum of three such signs, and each sign shall have a maximum size of 64 square feet.

(2) All other buildings having exposure to I-5/Hwy 217 shall be allowed one sign for each tenant for each building elevation (side or face) visible to vehicular traffic. Each building shall not be allowed more than a maximum of 6 signs (with a maximum of 3 signs on any one side or face of a building), and each sign shall have a maximum size of 48 square feet.

B. Buildings without exposure to I-5/Hwy 217 shall be allowed one sign for each tenant for each building elevation (side or face) visible to vehicular traffic. Each building shall not be allowed more than a maximum of 6 signs (with a maximum of 3 signs on any one side or face of a building), and each sign shall have a maximum size of 24 square feet. The maximum area may be increased in scale to a maximum of 32 square feet where appropriate for the size of the tenant and the scale of the building.

C. Retail development shall be allowed the signs attached to buildings generally permitted in LOC *47.10.410*(2).

3. *Additional Signs Allowed.*

A. On-site incidental signs shall be allowed up to 24 square feet in area.

B. Off-site incidental signs of up to 24 square feet shall be allowed. Off-site signs shall only be located on property which is not contiguous with the development site *and* which is not in the same ownership. Off-site signs all not be placed along arterial streets except their intersection with another arterial or collector street. Off-site signs for hotels shall have a maximum size of 32 square feet.

C. An on-site sign oriented primarily toward vehicle circulation which shall be limited in area to a maximum if two (2) square feet per tenant or use on the site, up to a maximum of forty (40) square feet.

D. One sign oriented toward pedestrian circulation areas shall be a maximum of twenty-four (24) square feet in area, and eight (8) feet in height. The sign may be freestanding or located on the building.

4. *Sign Features/Restrictions.*

A. No pole signs shall be allowed.

B. Off-site signs shall not be placed along arterial streets except at their intersection with another arterial, collector street or access entrance for multiple buildings.

C. Monument signs shall not exceed eight (8) feet in height.

D. All developments shall have sign criteria affecting the development as a whole approved as part of any master plan (Overall Development Plan and Schedule/Planned Development) approval to insure compatibility

between signs on individual development parcels or on individual structures.

(Ord. No. 2085, Enacted, 01/04/94)

(Ord. 2225, Amended, 02/01/2000)

**47.10.420 Permanent Signage Requiring Permit Allowed in Industrial Zones I and IP.**

In addition to the temporary and permanent signage allowed without permit in the industrial zones pursuant to LOC *47.06.205*, *47.08.300*(B)(2) and *47.08.305*, the following signage is allowed in industrial zones subject to permit and fee.

1. Free-Standing Signs.

A. *Allowable Area*: Maximum 32 square feet.

B. *Number*: One sign shall be allowed for the primary frontage. Another sign shall be allowed on any secondary frontage that is 300 feet or more in length.

C. *Height*: Maximum 8 feet.

D. *Sign Types*: Monument signs only

2. Signs Attached To Buildings.

A. *Allowable Area*: The 32 square foot maximum allowed for freestanding signs may be transferred to allow signs attached to buildings as an alternative. An additional sign or signs shall be allowed within a two foot high horizontal sign band. The sign band signs may be 75 percent of the building or business storefront whichever is less.

B. *Number*: The maximum 32 square foot sign shall be restricted identically to the freestanding sign. Signs within the sign band shall equal the number of frontage businesses located on the ground floor.

C. *Height*: The maximum 32 square foot sign shall not be placed higher than 18 feet on any structure. The sign band shall not exceed two feet in height and shall extend along one or more sides of a structure located between the windows and the parapet on a one story building with a pitched roof. On a multi-story building it shall be located above the windows and below the second story line.

D. *Sign Types*: Wall signs and sign bands are allowed.

3. Additional Signs Allowed.

A. Awning or canopy signs meeting the same size and number restrictions as sign bands may be submitted for the sign band signs allowed by LOC 47.10.420(2). The awning or canopy shall not extend into the right-of-way.

B. Multi-building complexes shall be allowed an additional monument sign of 32 square feet. This sign shall be located at the primary entrance to the complex and shall not extend six feet in height.

4. Sign Features/Restrictions.

A. Signs may be indirectly or internally illuminated.

B. Awning or canopy signs shall only backlight individual letters or graphics. The entire canopy shall not be backlighted.

C. Changeable copy, manual or electronic, shall be allowed for up to 50 percent of any allowed sign.

D. Lighting which is within 200 feet of a residential zone and which is substantially visible from any residential unit or vacant residential lot shall be extinguished between 10:00 P.M. and 8:00 A.M.

(Ord. No. 2085, Enacted, 01/04/94)

(Ord. 2225, Amended, 02/01/2000).

**47.10.425 Institutional, Public Facilities or Open Space Land Uses Listed As Conditional Nonconforming Uses.**

If an institutional use, public facility or open space land use is located on a site which is in a zone which allows the use only as a conditional use, or if the use is a nonconforming use, then the following restrictions apply. These restrictions are in addition to the temporary and permanent signage allowed without permit in the zone in which the use is located.

1. Free-Standing Signs.

A. *Allowable Area*: Maximum 32 square feet.

B. *Number*: One sign shall be allowed for the primary frontage. Another sign shall be allowed on any secondary frontage that is 300 feet or more in length.

C. *Height*: Maximum 6 feet.

D. *Sign Types*: Monument signs only.

2. Signs Attached To Buildings.

A. *Allowable Area*: The 32 square foot maximum allowed for freestanding signs maybe transferred to allow signs attached to buildings as an alternative.

B. *Number*: The sign shall be restricted identically to the freestanding sign.

C. *Height*: The sign shall not be placed higher than 18 feet on any structure.

D. *Sign Types*: Wall sign.

3. Additional Signs Allowed.

A. Non-illuminated 8 inch maximum signage shall be allowed on awnings or canopies.

4. Sign Features/Restrictions.

A. Except at otherwise indicated, signs may be indirectly or internally illuminated.

B. Changeable copy, manual or electronic, shall be allowed for up to 50 percent of any allowed sign.

C. Lighting which is within 200 feet of a. residential zone and. which is substantially visible from any residential unit or vacant residential lot shall be extinguished between 10:00 P.M. and 8:00 A.M.

(Ord. No. 208, Enacted, 01/04/94)

**Article 47.12**

**Variances.**

**Sections:**

**47.12.500 Variances.**

**47.12.500 Variances.**

1. All sign variances shall follow the same procedure as a Class I variance to the Development Code and shall be regulated pursuant to the procedural provisions of LOC 49.28.400(2)

2. The granting authority may approve a variance to any requirement of this chapter if the applicant demonstrates that:

A. Strict application of the code requirement would deny the applicant a reasonable opportunity to communicate by sign in a manner similar to like persons or uses because of an unusual or unique circumstance relating to the property or the proposal, such as site or building location, building design, physical features on the property, or some other circumstance;

B. The sign which would result from the variance will not affect the surrounding neighborhood or other property affected by the request in a manner materially inconsistent with the purpose of the Sign Code expressed in LOC 47.03.010; and

C. The degree of the variance is limited to that reasonably necessary to alleviate the problem created by the unique or unusual circumstance identified pursuant to subsection 2(A) of this section.

(Ord. No. 789, Sec. 21; 12-05-61. Ord. No. 921, Sec. 19; 07-02-85. Ord. No. 2085, Enacted, 01/04/94)

(Ord. 2225, Amended, 02/01/2000)

## APPENDIX F

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**UNITED STATES DISTRICT COURT**

**DISTRICT OF OREGON**

| | |
|---|---|
| **G.K. LTD, TRAVEL**, an Oregon corporation, **WH. GILLISON, KATHLEEN KUSUDO** and **RAMSAY SIGNS, INC.**, and Oregon corporation,<br><br>**PLAINTIFFS,**<br><br>v.<br><br>**CITY OF LAKE OSWEGO**, and **SANDY INGALLS,**<br><br>**DEFENDANTS.** | Case No. CV 02-1147-KI<br><br>**FIRST AMENDED COMPLAINT**<br>(42 USC § 1983 – First Amendment/Takings/ Equal Protection; Declaratory and Injunctive Relief)<br><br>**DEMAND FOR JURY TRIAL**<br><br>(Filed Oct. 24, 2002) |

Plaintiffs allege:

## JURISDICTION

1.

This court has jurisdiction over this case pursuant to 28 USC §§ 1331, 1343, 2201, *et seq.* and 42 USC § 1983. As alleged in further detail below, plaintiffs seek declaratory and injunctive relief and damages, claiming that defendants' regulatory scheme violates plaintiffs' rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution and unconstitutionally chills the protected speech of others all under color of state law.

## PARTIES

2.

Plaintiff G.K. LTD. Travel (hereinafter, "G.K.") is an Oregon corporation with its principal place of business located in Lake Oswego, Oregon. G.K. is engaged in business as a travel agent.

3.

Plaintiff WH. Gillison (hereinafter, "Gillison") is an individual residing in Oregon who owns the controlling interest in plaintiff G.K. The remaining interest of G.K. is owned by plaintiff Kathleen Kusudo ("hereinafter, "Kusudo"), a woman of Asian descent.

4.

Plaintiff Ramsay Signs, Inc. (hereinafter, "Ramsay") is an Oregon corporation with its principal place of business located in Portland, Oregon. Ramsay is engaged in the business of manufacturing, leasing, selling

and installing various types of signs, including pole signs, to businesses in the City of Lake Oswego, Oregon, among other places.

5.

Defendant City of Lake Oswego (hereinafter, the "City") is a municipal corporation organized and existing under the laws of the State of Oregon. The City has enacted ordinances establishing a Sign Code which, as will be alleged in further detail below, impacts plaintiffs' ability to maintain a sign or their property and generally impacts others' ability to express themselves in the city.

6.

At all times material to the allegations contained in this Complaint, defendant Sandy Ingalls (hereinafter, "Ingalls") was employed by the City as a Code Enforcement Specialist, whose duties involve enforcement of the City's Sign Code.

**CAPACITY**

7.

At all times material to the allegations contained in this Complaint, defendants acted in an official capacity with respect to plaintiffs and others.

8.

Prior to the enactment and enforcement of the ordinances at issue in this dispute, the law prohibiting defendants from enacting and enforcing such ordinances has been clearly established.

## GENERAL ALLEGATIONS

9.

At all times material to the allegations contained in this Complaint, plaintiff Ramsay owned a certain pole sign located at 15385 SW Boones Ferry Road in Lake Oswego, Oregon (hereinafter, the "Sign"). Ramsay has continuously lease [sic] the sign to plaintiff G.K. and its predecessors since 1980. The Sign is located in an area zoned by the city as General Commercial (GC). The Sign is a type of sign that has been customarily and continuously used at its location and in its area.

10.

In 1980, plaintiff Ramsay entered into a five-year lease agreement with a business entity known as Apollo Travel, Inc. for the Sign. The copy placed on the sign in October, 1980 read: "Apollo Travel." At that time, the Sign conformed with all requirements imposed by the City's Sign Code then in effect. Ramsay continued its lease agreement with Apollo Travel, Inc. through October 31, 1996. Throughout that time period, the copy on the sign remained unchanged.

11.

On or about January 4, 1994, the City enacted Ordinance No. 2085 amending its Sign Code to ban/heavily restrict the use of pole signs within the City and further requiring non-conforming signs to become conforming upon a change in ownership followed by a change in copy on the non-conforming sign. A true and correct copy of Ordinance No. 2085 is attached hereto as Exhibit A and incorporated herein by this reference.

12.

Upon information and belief, a business entity know as Keller & Pinnell Travel, LLC d/b/a Journeys! of Lake Oswego (hereinafter, "Journeys!") purchased Apollo Travel, Inc. during the fall of 1996. Upon information and belief, Keller & Pinnell Travel, LLC was owned and operated by Rolf Keller and Carol Laflen Pinnell, both of whom are caucasian. On or about October 31, 1996, Ramsay entered into a five-year lease agreement with Journeys! for use of the Sign. The copy on the sign was changed in November, 1996 to read: "Journeys! of Lake Oswego, Formerly Apollo Travel."

13.

In 2000, plaintiff Gillison established G.K. as a travel agency. On or about January 16, 2001, the City issued G.K. a business license.

14.

On or about February 10, 2001, G.K. purchased Journeys!. As a part of its plan to continue operating a travel business at the Journeys! location, on February 27, 2001, G.K. entered into a continuation of the lease agreement with Ramsay for the use of the Sign. Under the terms of the agreement, G.K. provided Ramsay with a change of copy for the Sign.

15.

Without modifying it structure in any way, Ramsay changed the copy on the Sign from "Journeys! of Lake Oswego, Formerly Apollo Travel." to "G.K. Ltd. Travel Groups Tours Cruises Complete Travel Services Domestic & International."

16.

On or about April 12, 2001, defendant Ingalls contacted G.K. regarding the Sign. Defendant Ingalls informed plaintiffs G.K. and Gillison that, because there had been a change in ownership of the travel business and a change in copy on the Sign, the Sign needed to be brought into conformity with the provisions of Chapter 47 of the City's Development Code (hereinafter, the "Sign Code"). In order to bring the Sign into conformity with the Sign Code, the Sign will have to be removed. A true and correct copy of the Sign Code is attached hereto as Exhibit B and is incorporated herein by this reference.

17.

In late April, 2001, G.K. informed Ramsay that Ingalls and the City had told G.K. that the Sign would have to be removed. G.K. agreed with Ramsay to allow Ramsay to pursue further legal proceedings to either obtain permission to continue to use the Sign in its present form or to contest the validity of the Sign Code.

18.

On or about May 29, 2001, plaintiff Ramsay filed an application with the City for a face change permit. In conjunction with its application, Ramsay paid the City $122.00 for the permit.

19.

On or about August 23, 2001, defendant Ingalls had a uniformed police officer deliver to plaintiff Gillison a citation alleging a violation of Sections 47.04.115 and 47.03.025 of the Sign Code. A true and correct copy of the

citation is attached hereto as Exhibit C and incorporated herein by this reference.

20.

In a letter dated August 30, 2001, defendant Ingalls notified G.K. that the City denied Ramsay's request for a face change permit, finding that the change in the business name constituted "a change of use of a business of premise" under the Sign Code, and that the " . . . existing sign underwent a change of copy due to a change in business . . . Accordingly, the sign must come into compliance with the Sign code."

21.

Neither defendant Ingalls nor the City refunded to Ramsay the fee paid for the face change permit.

22.

On or about October 4, 2001, plaintiff Ramsay began the application process for a variance from the pole sign prohibition pursuant to procedures set forth in the Sign Code, and paid the required fees.

23.

On or about October 9, 2001, Ramsay paid the bail amount of $100.00 to the City as required by the citation served on plaintiff G.K. on or about August 23, 2001.

24.

On or about December 17, 2001, the City's Planning Director denied Ramsay's request for a variance.

25.

Ramsay next appealed that denial to the City's Development Review Commission (hereinafter, the "DRC") as required by the Sign Code.

26.

On February 15, 2002, the DRC issued a memorandum decision affirming the denial of the variance. A true and correct copy of the DRC's memorandum decision is attached hereto as Exhibit D and incorporated herein by this reference.

27.

Following the DRC's decision, Ramsay appealed to the City Council in accordance with the procedures established by the Sign Code.

28.

On or about May 14, 2002, the City Council affirmed the DRC's decision in a written decision entitled: "Findings, Conclusions, and Order." A true and correct copy of the City Council's decision is attached hereto as Exhibit E and incorporated herein by this reference.

29.

Neither defendant Ingalls nor the City refunded, in whole or in part, any of the fees paid by Ramsay for the variance.

30.

Upon information and belief, the Sign is a significant means of attracting customers to plaintiff G.K.'s business, and produces a significant amount of its income.

31.

The Sign provides a cheap and effective means of advertising of G.K. that, if removed, would cost an amount to be determined at trial to replace and would significantly diminish G.K.'s ability to communicate its commercial message in the local marketplace of ideas.

32.

The Sign generates monthly revenue to plaintiff Ramsay, and the loss of the Sign would cause economic injury to Ramsay in an amount to be determined at trial.

33.

The Sign generates profits to plaintiff Gillison through his interest in G.K., and the loss of the Sign would cause economic injury in an amount to be determined at trial.

34.

Since its adoption of the current Sign Code, the official policy of the city has consisted of biased applications of its restrictions as an artifice to condition the content of commercial and noncommercial speech on the speaker's compliance with standardless, subjective, personal aesthetic preferences of the several officials, including defendant Ingalls, who control the Sign Code's enforcement and administration.

**FIRST CLAIM FOR RELIEF**

**(42 USC § 1983 (Damages) –
Violation of First Amendment: Unconstitutional
Regulation of Commercial Speech
As Applied to Plaintiffs)**

35.

Plaintiffs reallege paragraphs 1 through 24 above and hereby incorporate them by reference as if fully alleged herein.

36.

This claim is brought by plaintiffs G.K. and Ramsay against defendants Ingalls and the City. As alleged above, defendants Ingalls and the City, acting under §§ 47.04.100(1) and 47.10.410 of the Sign Code, issued a citation to plaintiff G.K. for allegedly unlawfully changing the content to plaintiff Ramsay's pole sign in violation of §§ 47.04.115 and 47.03.025 of the Sign Code (hereinafter referred to as "the challenged regulations").

37.

The message Ramsay put on the Sign pursuant to its lease agreement with G.K., which caused defendant Ingalls and the City to issue the citation, is truthful, non-misleading and is concerning a lawful activity.

38.

None of the governmental purposes identified by the City in §47.03.010 of the Sign Code are compelling or substantial. Nor is there any compelling or substantial governmental purpose that is not identified in §47.03.010 of the Sign Code.

39.

Assuming, without admitting, that any of the governmental purposes identified in §47.03.010 of the Sign Code are compelling or substantial or that there are any other compelling or substantial governmental purposes served by the Sign Code, they are not directly and materially furthered by the Sign Code and the challenged regulations.

40.

Assuming, without admitting, that any of the governmental purposes identified in §47.03.010 of the Sign Code are compelling or substantial or that there are any other compelling or substantial governmental purposes served by the Sign Code, the Sign Code and the challenged regulations are not the least restrictive means available of achieving them.

41.

As a direct and proximate consequence of enacting and enforcing the challenged regulations, under color of state law, defendants have violated plaintiffs' rights to free speech as guaranteed by the First Amendment to the United States Constitution and 42 USC § 1983.

42.

Plaintiffs have suffered and will suffer substantial economic loss proximately caused by enforcement of the Sign Code and the challenged regulations in an amount to be established at trial for which defendants are liable.

43.

In addition, plaintiffs are entitled to an award of their reasonable attorney fees incurred in prosecuting this action in accordance with 42 USC § 1988.

**SECOND CLAIM FOR RELIEF**

**(42 USC § 1983 (Declaratory & Injunctive Relief) – Violation of First Amendment: Unconstitutional Regulation of Commercial Speech as Applied to Plaintiffs)**

44.

Plaintiffs reallege paragraphs 1 through 36 through 41, and 43 above hereby incorporate them by reference as if fully alleged herein.

45.

A present, actual, and justiciable controversy has arisen between plaintiffs G.K. and Ramsay, and defendants Ingalls and the city as to whether the challenged regulations are unconstitutional as applied to plaintiffs G.K. and Ramsay.

46.

Plaintiffs have no adequate remedy at law.

47.

The challenged regulations should be stricken as unconstitutional violations of the First Amendment, declared unenforceable, and the City and defendant Ingalls should be enjoined from enforcing them.

48.

If stricken, the challenged regulations are so inseparably related to the remaining provisions of the Sign Code that their absence will render the balance of the Sign Code unenforceable. Accordingly, the Sign Code should be stricken in its entirety, declared unenforceable, and the City and defendant Ingalls should be enjoined from enforcing them.

49.

Moreover, the city would not have enacted the Sign Code in its current form without the challenged regulations. Accordingly, state law also requires that the Sign Code be stricken in its entirety, declared unenforceable, and the city and defendant Ingalls should be enjoined from enforcing them.

**THIRD CLAIM FOR RELIEF**

**(42 USC § 1983 (Declaratory & Injunctive Relief) – Violation of First Amendment: Unconstitutional Ban on Protected Medium of Speech As Applied to Plaintiffs)**

50.

Plaintiffs reallege paragraphs 1 through 34, 38 through 41, 43, and 45 through 49 above and hereby incorporate them by reference as if fully alleged herein.

51.

This claim is brought by plaintiffs G.K. and Ramsay against defendants Ingalls and the City. Pole signs are a unique form of communication that allow free commercial

and non-commercial expression, provide customers and profits to businesses, and are customarily and historically used in the Lake Oswego business community.

52.

The following provisions of the Sign Code either impose a complete ban on pole signs in certain zones of the City by May 21, 2004 or sooner if the business or use of the sign changes, or requires a strong showing of necessity on the part of an applicant to obtain a variance from the prohibition in other zones: §§ 47.10.405(1), 47.10.410(1)(D), 47.10.412, 47.10.415(4)(A), and 47.10.420(1)(D) (hereinafter collectively referred to as "the challenged regulations").

53.

By enacting and enforcing the challenged regulations and the Sign Code, the City has willfully and unlawfully deprived plaintiffs, and other citizens of Lake Oswego, of their right of free expression through the medium of pole signs as guaranteed by the First Amendment of the United States Constitution.

**FOURTH CLAIM FOR RELIEF**

**(43 USC § 1983 (Damages) – Violations of First Amendment: Unconstitutional Ban on Protected Medium of Speech As Applied to Plaintiffs)**

54.

Plaintiffs reallege paragraphs 1 through 34, 38 through 43, and 51 through 52 above and hereby incorporate them by reference as if fully alleged herein.

55.

This claim is brought by plaintiffs G.K. and Ramsay against defendants Ingalls and the City. As applied to plaintiffs, the Sign Code and the challenged regulations listed in paragraph 52 above ban their ongoing use of the Sign and would not allow plaintiffs to place another pole sign in its place.

56.

The City has enacted and defendant Ingalls has enforced the Sign Code and the challenged regulations listed in paragraph 52 above, to ban plaintiffs' continued use and maintenance of the Sign.

57.

By enacting and enforcing the Sign Code and the challenged regulations listed in paragraph 52 above, the city has willfully and unlawfully deprived plaintiffs of their right of free expression through the medium of pole signs as guaranteed by the first Amendment of the United States Constitution.

**FIFTH CLAIM FOR RELIEF**

**(42 USC § 1983 (Damages) – Violations of Equal Protection: Selective Enforcement of Sign Code Based on Race)**

58.

Plaintiffs reallege paragraphs 1 through 34 and 41 through 43 above and hereby incorporate them by reference as if fully alleged herein.

59.

This claim is brought by plaintiffs G.K. and Kusudo against defendants Ingalls and the City. The City and defendant Ingalls have selectively chosen to enforce the Sign Code against Kusudo, G.K. and Ramsay, and not against the prior caucasian owners of Journeys! (identified above in paragraph 12) although the facts and law supporting the City's enforcement were identical during the period in which Journeys! conducted its travel business from 1996 (two years after the statute was enacted) until 2000.

60.

None of the governmental purposes identified by the City in §47.03.010 of the Sign Code are compelling or substantial. No is there any compelling or substantial governmental purpose that is not identified in §47.03.010 of the Sign code.

61.

Assuming, without admitting, that any of the governmental purposes identified in §47.03.010 of the Sign Code are compelling or substantial or that there are any other compelling or substantial governmental purposes served by the Sign Code, the classifications adopted by the City in enforcing its Sign Code and the challenged regulations are not necessary to serve those purposes.

62.

The selective enforcement of the Sign Code deprives plaintiffs of equal protection of the law as it relates to their rights to free speech all as guaranteed under the

First and Fourteenth Amendments to the United States Constitution.

**SIXTH CLAIM FOR RELIEF**

**(42 USC § 1983 (Just Compensation) – Taking of Plaintiffs' Property Interests: Removal of Sign)**

63.

Plaintiffs reallege paragraphs 1 through 34 and 43 above and hereby incorporate them by reference as if fully alleged herein.

64.

This claim is brought by plaintiffs G.K. and Ramsay against defendants Ingalls and the City. Plaintiffs G.K., and Ramsay each have a continuing property interest in the revenue stream generated by the Sign.

65.

Defendants Ingalls and the City, acting in their official capacities to enforce §§ 47.04.100(1) and 47.04.100(5) of the Sign Code, are taking, or will take, all of the value of the Sign by requiring its removal.

66.

The process for removal does not include any provision for the City to pay just compensation for the value of plaintiffs' property interests that have been taken nor requiring the City to give plaintiffs a notice and opportunity to be heard on the issue of the value of the property interests.

67.

As a consequence, under color of state law, defendants are taking plaintiffs' property interests without payment of just compensation in violation of plaintiffs' right to notice and an opportunity to be heard on the issue of the value of such property interests, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

68.

Plaintiffs are entitled to an award of just compensation in the amount of the reasonable value of plaintiffs' property interest as determined at trial.

**SEVENTH CLAIM FOR RELIEF**

**(42 USC § 1983 (Declaratory & Injunctive Relief) – Taking of Plaintiffs' Property Interests: Alternative Claim to Strike Amortization Scheme as Facially Unconstitutional)**

69.

Plaintiffs reallege paragraphs 1 through 34, 43, and 45 through 49 above and hereby incorporate them by reference as if fully alleged herein.

70.

This claim is brought by plaintiffs G.K. and Ramsay against defendants Ingalls and the City. The following sections of the Sign Code will terminate and take from plaintiffs and others the right to continue a lawful nonconforming use of their signs which has been enjoyed since the incorporation of the city. §§ 47.04.100(5) and

47.04.102(1) (hereinafter referred to as "the challenged regulations").

71.

The nonconforming signs contain speech which generates an ongoing economic value, as well as other value, to the persons who own and employ them.

72.

The City's forced removal of these signs would take all of the value of these signs from the signs' owners.

73.

The Sign Code contains no provisions for the payment of just compensation or allowing sign owners a notice and opportunity to be heard on the issue of the value of speech lost as a result of the forced removal of existing signs.

74.

As a consequence, defendants are employing an overbroad facially invalid statute as a means of taking plaintiffs' and others' commercial speech and property interests generated by such speech, under color of state law without payment of just compensation, and without notice and an opportunity to be heard as part of an unlawful scheme to violate their First Amendment right to expression and to deny them guarantees of just compensation and due process of law mandated by the Fifth and Fourteenth Amendments to the United States Constitution.

## EIGHTH CLAIM FOR RELIEF

**(42 USC § 1983 (Declaratory & Injunctive Relief) – Violation of First Amendment: Facially Unconstitutional Regulation of Non-Commercial Speech on the Basis of Content)**

75.

Plaintiffs reallege paragraphs 1 through 34, 38 through 40, 43, and 45 through 49 above and hereby incorporate them by reference as if fully alleged herein.

76.

This claim is brought by plaintiffs G.K., Ramsay, Gillison and Kusudo against defendants Ingalls and the City. The following sections of the Sign Code are a pervasive regulation of signs in the City based on non-commercial content and are unsupported by a compelling state interest: §§ 47.04.100(1), 47.04.115(10), 47.06.200(4), 47.06.200(5), 47.06.205(10), 47.08.300(b)(1)(a), 47.03.300(B)(2)(a), 47.10.400, 47.10.412(1)(A), 47.10.412(1)(D), 47.10.412(1)(E), and 47.08.305(1) (hereinafter collectively referred to as "the challenged regulations").

77.

As a direct and proximate consequence of enacting and enforcing the challenged regulations, under color of state law, defendants have violated the rights of its citizens to free speech as guaranteed by the First Amendment to the United States Constitution and 42 USC § 1983.

## NINTH CLAIM FOR RELIEF

**(42 USC § 1983 (Declaratory & Injunctive Relief) – Violation of First Amendment: Facially Unconstitutional Regulation of Non-Commercial Speech Based on Viewpoint)**

78.

Plaintiffs reallege paragraphs 1 through 34, 38 through 40, 43, and 45 through 49 above and hereby incorporate them by reference as if fully alleged herein.

79.

This claim is brought by plaintiffs G.K., Ramsay, Gillison and Kusudo against defendants Ingalls and the City. The following sections of the Sign Code are a pervasive regulation of signs in the City based on non-commercial content and are unsupported by a compelling state interest: §§ 47.04.115(4), 47.04.115(9), 47.04.115(15), 47.08.300(B)(2)(d), 47.06.205(3), 47.06.205(4), 47.06.205(7), 47.06.205(9), 47.10.410(3)(D), 47.10.410(E), 47.10.412(6)(D), 47.10.415(1)(C), 47.10.415(D), 47.10.415(2)(A)(1), 47.10.415(2)(C), and 47.10.415(3)(B) (hereinafter collectively referred to as "the challenged regulations").

80.

As a direct and proximate consequence of enacting and enforcing the challenged regulations, under color of state law, defendants have violated the rights of its citizens to free speech as guaranteed by the First Amendment to the United States Constitution and 42 USC § 1983.

## TENTH CLAIM FOR RELIEF

### (42 USC § 1983 (Declaratory & Injunctive Relief) – Violation of First Amendment: Facially Unconstitutional Regulation of Commercial Speech)

81.

Plaintiffs reallege paragraphs 1 through 34, 38 through 40, 43, and 45 through 49 above and hereby incorporate them by reference as if fully alleged herein.

82.

This claim is brought by plaintiffs G.K., Ramsay, Gillison and Kusudo against defendants Ingalls and the City. The following sections of the Sign Code are a pervasive regulation of signs in the City based on commercial content and are unsupported by either a substantial or compelling state interest: §§ 47.06.205, 47.08.300, 47.08.305, 47.10.410, 47.10.415, and 47.10.420 (hereinafter collectively referred to as "the challenged regulations").

83.

The challenged regulations regulate commercial speech that is truthful, non-misleading, and concerning a lawful activity.

84.

As a direct and proximate consequence of enacting and enforcing the challenged regulations, under color of state law, defendants have violated the rights of its citizens to free speech as guaranteed by the First Amendment to the United States Constitution and 42 USC § 1983.

## ELEVENTH CLAIM FOR RELIEF

**(42 USC § 1983 (Declaratory & Injunctive Relief) – Violation of First Amendment: Facially Unreasonable Time, Place or Manner Regulation)**

85.

Plaintiffs reallege paragraphs 1 through 34, 38 through 40, 43, and 45 through 49 above and hereby incorporate them by reference as if fully alleged herein.

86.

This claim is brought by plaintiffs G.K., Ramsay, Gillison and Kusudo against defendants Ingalls and the City. The following sections of the Sign Code represent a pervasive regulation of signs in the City: §§ 47.04.115, 47.12.500 (hereinafter referred to as "the challenged regulations").

87.

The Sign Code and the challenged regulations do not provide ample alternative channels of communication.

88.

In addition, the Sign Code and the challenged regulations burden substantially more speech than is necessary to further the government's legitimate interests.

89

As a direct and proximate consequence of enacting and enforcing the challenged regulations, under color of state law, defendants have violated the rights of its citizens to free speech as guaranteed by the First Amendment to the United States Constitution and 42 USC § 1983.

## TWELFTH CLAIM FOR RELIEF

### 42 USC § 1983 (Declaratory & Injunctive Relief) – Violation of First Amendment: Facially Unconstitutional Preferential Treatment to Commercial Speech Over Non-Commercial Speech)

90.

Plaintiffs reallege paragraphs 1 through 34, 38 through 40, 43, and 45 through 49 above and hereby incorporate them by reference as if fully alleged herein.

91.

This claim is brought by plaintiffs G.K., Ramsay, Gillison and Kusudo against defendants Ingalls and the City. The following sections of the Sign Code specifically grant preferential treatment in the City to speech that proposes a commercial transaction over other types of speech and are unsupported by a compelling state interest: §§ 47.08.300(B)(1)(b), 47.08.300(B)(2)(b), 47.08.300(B)(2)(e), 47.08.300(B)(1)(d), 47.04.115(3), 47.06.205(9), and 47.10.410(3)(E) (hereinafter collectively referred to as "the challenged regulations").

92.

As a direct and proximate consequence of enacting and enforcing the challenged regulations, under color of state law, defendants have violated the rights of its citizens to free speech as guaranteed by the First Amendment to the United States Constitution and 42 USC § 1983.

## THIRTEENTH CLAIM FOR RELIEF

**(42 USC § 1983 (Declaratory & Injunctive Relief) – Violation of First Amendment: Facially Insufficient Procedural Safeguards)**

93.

Plaintiffs reallege paragraphs 1 through 34, 38 through 40, 43, and 45 through 49 above and hereby incorporate them by reference as if fully alleged herein.

94.

This claim is brought by plaintiffs G.K., Ramsay, Gillison and Kusudo against defendants Ingalls and the City. The Sign Code conditions speech on prior approval of public officials and works to inhibit or suppress communication before it reaches the public.

95.

The following sections of the Sign Code do not contain the required procedural safeguards attendant to the permit process to make a decision within a specified brief period of time: §§ 47.06.200, 47.08.300, 47.10.400, and 47.10.415 (hereinafter referred to as "the challenged regulations").

96.

The Sign Code and the challenged regulations do not guarantee the initiation of a prompt judicial determination to be brought by the City.

97.

The Sign Code and the challenged regulations do not place the burden on the City in any judicial determinations to prove that the regulated speech is not protected.

98.

The Sign Code and the challenged regulations do not maintain the status quo after initiating a judicial determination or guarantee the initiation of a prompt judicial determination.

99.

As a direct and proximate consequence of enacting and enforcing the challenged regulations, under color of state law, defendants have violated the rights of its citizens to free speech as guaranteed by the First Amendment to the United States Constitution and 42 USC § 1983.

**FOURTEENTH CLAIM FOR RELIEF**

**(42 USC § 1983 (Declaratory & Injunctive Relief) – Violation of First Amendment: Facially Unconstitutional Grant of Overly Broad Discretion)**

100.

Plaintiffs reallege paragraphs 1 through 34, 38 through 40, 43, and 45 through 49 above and hereby incorporate them by refence as if fully alleged herein.

101.

This claim is brought by plaintiffs G.K., Ramsay, Gillison and Kusudo against defendants Ingalls and the City. The following sections of the Sign Code place

unbridled discretion in the hands of government officials or agencies charged with enforcement and result in censorship: §§ 47.06.200, 47.08.300, 47.08.305, 47.10.412, 47.10.415 (hereinafter collectively referred to as "the challenged regulations").

102.

As a direct and proximate consequence of enacting and enforcing the challenged regulations, under color of state law, defendants have violated the rights of its citizens to free speech as guaranteed by the First Amendment to the United States Constitution and 42 USC § 1983.

**FIFTEENTH CLAIM FOR RELIEF**

**(42 USC § 1983 (Declaratory & Injunctive Relief) – Violation of Equal Protection: Facially Unconstitutional Discrimination Between Similarly Situated Persons)**

103.

Plaintiffs reallege paragraphs 1 through 34, 43, and 45 through 49 above and hereby incorporate them by reference as if fully alleged herein.

104.

This claim is brought by plaintiffs G.K., Ramsay, Gillison and Kusudo against defendants Ingalls and the City. As alleged above, the Sign Code contains numerous provisions that burden and seek to pervasively regulate speech.

105.

In its regulation of speech, the following sections of the Sign Code discriminate between similarly situated persons: §§ 47.04.100, 47.04.102, and 47.08.300 (hereinafter referred to as "the challenged regulations").

106.

None of the governmental purposes identified by the City in §47.03.010 of the Sign Code are compelling or substantial. Nor is there any compelling or substantial governmental prupose that is not indentified in §47.03.010 of the Sign Code.

107.

Assuming, without admitting, that any of the governmental purposes identified in §47.03.010 of the Sign Code are compelling or substantial or that there are any other compelling or substantial governmetnal purposes served by the Sign Code, the classificaiton adopted by the City in its Sign Code and the challenged regulations are not necessary to serve those purposes.

108.

As a direct and proximate consequence of enacting and enforcing the challenged regulations, under color of state law, defendants have violated the rights of its citizens to equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and 42 USC § 1983.

## SIXTEENTH CLAIM FOR RELIEF

**(42 USC § 1983 (Declaratory & Injunctive Relief) – Violation of First Amendment: Facially Unconstitutionally Overbroad Regulation of Speech)**

109.

Plaintiffs reallege paragraphs 1 through 34, 43, and 45 through 49 above and hereby incorporate them by reference as if fully alleged herein.

110.

This claim is brought by plaintiffs G.K., Ramsay, Gillison and Kusudo against defendants Ingalls and the City. As alleged above, the Sign Code contains numerous provisions that burden and seek to pervasively regulate speech.

111.

The Sign Code's burdens and regulation of speech are unconstitutionally overbroad in that it reaches a substantial amount of constitutionally protected speech. In addition, the Sign Code burdens substantially more speech than is necessary to further the government's legitimate interests.

112.

As a direct and proximate consequence of enacting and enforcing the challenged regulations, under color of state law, defendants have violated the rights of its citizens to free speech as guaranteed by the First Amendment to the United States Constitution and 42 USC § 1983.

## SEVENTEENTH CLAIM FOR RELIEF

**(42 USC § 1983 (Declaratory & Injunctive Relief) – Violation of First Amendment: Facially Unconstituionally Vague Regulation of Speech)**

113.

Plaintiffs reallege paragraphs 1 through 34, 43, and 45 through 49 above and hereby incorporate them by reference as if fully alleged herein.

114.

This claim is brought by plaintiffs G.K., Ramsay, Gillison and Kusudo against defendants Ingalls and the City. As alleged above, the Sign Code contains numerous provisions that burden and seek to pervasively regulate speech.

115.

The First Amendment to the United States Constitution protects plaintiffs and others from arbitrary and discriminatory enforcement of vague standards.

116.

The following sections of the Sign Code are vague and/or ambiguous on their face, lacking definition or other clarity and require governmental officials to determine what the ambiguous [sic] of vague words mean based on the official's subjective interpretation thereof prior to deciding whether to approve a requested permit: §§ 47.04.100, 47.05.105, 47.04.115, 47.06.200, 47.06.205, 47.08.305, 47.10.410, 47.10.412, 47.10.415, 47.10.420, 47.10.425, and 47.10.500 (hereinafter collectively referred to as "the challenged regulations").

117.

As a direct and proximate consequence of enacting and enforcing the challenged regulations, under color of state law, defendants have violated the rights of its citizens to free speech as guaranteed by the First Amendment to the United States Constitution and 42 USC § 1983. WHEREFORE plaintiffs pray for judgment against defendants as follows:

1. A judgment declaring that the Sign Code is unconstitutional on its face;

2. A judgment declaring that the Sign Code is unconstitutional as applied to plaintiffs;

3. An order striking the Sign Code from the City's Development Code and enjoining defendants from in any way enforcing the Sign Code;

4. A judgment awarding plaintiffs' damages and/or just compensation as will be determined at trial;

5. An award of plaintiffs' reasonable attorney fees incurred herein;

6. An award of plaintiffs' costs and disbursements incurred herein; and

7. Such other and further relief as the court deems just and equitable.

**DEMAND FOR JURY TRIAL**

Plaintiffs hereby make a demand for a jury pursuant to Federal Rule of Civil Procedure 38 and Local Rule 38.1.

DATED this 24th day of October, 2002.

RAMIS CREW
CORRIGAN & BACHRACH, LLP

By: /s/ T. Chad Plaster
Stephen F. Crew, OSB #78171
T. Chad Plaster, OSB #98092

Douglas M. Bragg, OSB #01211
Of Attorneys for Plaintiffs

# APPENDIX G

## PETITIONER'S DESCRIPTION OF SUMMARY JUDGMENT CLAIMS

Plaintiffs alleged seventeen claims for relief claiming deprivations of civil rights under color of state law. Four are damages claims (Claim 1, [facially unconstitutional sign code] Claim 5 [selective enforcement of invalid sign code based on race], Claim 6 [unlawful taking of property under sign code], and claim 7 [alternative unlawful taking of property under sign code].

There are ten claims for declaratory and/or injunctive relief (Claim 2 [unconstitutional application of sign code based on content of speech], Claim 3, [unconstitutional ban of medium] Claim 4 [second unconstitutional ban of medium] Claim 8 [facially unconstitutional content based regulation of non-commercial speech] Claim 9 [facially unconstitutional identity based regulation of non-commercial speech based on viewpoint], Claim 10 [facially unconstitutional regulation of commercial speech] Claim 12 [facially unconstitutional preference of commercial over non-commercial speech] Claim 13 [facially insufficient prior restraint safeguards] 14 [facially overbroad discretion vested in permitting officials] Claim 15 [facially unconstitutional discrimination between similarly situated persons]. There are two additional overbreadth challenges based upon independent failures of the city to produce persuasive evidence that it complied with standards of review applied to restrictions on commercial and non-commercial speech. (Claims 11 and 16). The remaining claim seeks a declaration that the section of the sign code that controls application of the permitting process is unconstitutionally vague. (Claim 17)

The district court correctly concluded that the plaintiffs did not pursue judgment on claim 5 [racial discrimination] and claims 6 and 7 [5th and 14th Amendment takings claims]. However the only other claims that were not pursued in the appeals court were overlapping Claims 15 and 16. The petitioners also argued at summary judgment that the permitting process and sign code were and are applied as unconstitutional prior restraints on speech based on evidence produced during formal discovery that contains several judicial admissions supporting that conclusion. Petitioners modified their vagueness claim to include judicial admissions that the permitting standards are vague and have been left intentionally vague to further an admitted pattern of censorship in the permitting process.

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## APPENDIX H

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Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT**

**DISTRICT OF OREGON**

| | |
|---|---|
| **G.K. LTD, TRAVEL**, an Oregon corporation, **WH. GILLISON, KATHLEEN KUSUDO** and **RAMSAY SIGNS, INC.**, an Oregon corporation,<br><br>**PLAINTIFFS,**<br><br>v.<br><br>**CITY OF LAKE OSWEGO**, and **SANDY INGALLS,**<br><br>**DEFENDANTS.** | Case No. CV 02-1147-KI<br><br>**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR F.R.CIV.P. 60(b)(4) MOTION TO VACATE OPINION AND RELATED ORDERS** |

* * *

summary judgment.

In disregarding the conflicting evidence identified herein, the Court unlawfully invaded the province of the Jury by weighing that evidence and drawing undisclosed inferences thereby acting in excess of its jurisdiction. Its grant of summary judgment is an unlawful deprivation of plaintiffs' right to due process of law as guaranteed by the 5th and 14th Amendments.

The primary authorization for the relief plaintiffs seek is found in F.R.Civ.P. 60(b)(4). While the rule is generally applied to judgments, it also pertains to "orders". The Opinion of Court and related orders are clearly the predicate for the coming judgment and no purpose is served by waiting for final judgment to enter before requested a stop to this unconstitutional use of Rule 56. If that judgment does enter it will be *void ab initio*.

The approaching "amortization" date which the City intends to use to illegally coerce an estimated 30 businesses into abandoning their right to protected expression is coming within a few weeks. Plaintiffs intend to seek a stay of enforcement against the entire sign code in the event the Court continues to refuse to acknowledge defendants' failure to sustain their burden of production and persuasion.

* * *

## APPENDIX I

G.K. Ltd. Travel et al v. City of Lake Oswego et al
Assigned to:
Judge Garr M. King
Referred to:
Demand: $100000
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 42:1983 Civil Rights Act

Date Filed: 08/23/02
Jury Demand: Plaintiff
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

**Plaintiff**

---

**G.K. Ltd. Travel,**
***an Oregon corporation***

represented by:

**Douglas M. Bragg**
Attorney at Law
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(971) 219-3297
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*LEAD ATTORNEY*
*ATTORNEY TO BE NOTICED*

* * *

| | | |
|---|---|---|
| 10/14/2003 | 59 | **ORDER:** Record of Order – Granting Plaintiffs' Motion for Enlargement of Time To File Reply Memoranda in Support of Motions for Summary Judgment (#56). All replies to summary judgment motions (#38 & 432) are due on or before 10/16/2003. By Judge Garr M. King. (Related documents(s) 38, 43) (ecp,) (Entered: 10/14/2003) |
| 10/16/2003 | 60 | Reply to Motion *Reply Memorandum in Support of Defendants' Motion for Summary Judgment*. Filed by all defendants. (Related motion(s) 38) (Sercombe, Timothy) (Entered: 10/16/2003) |
| 10/16/2003 | 61 | Affidavit of *Affidavit of Barbara Parr in Support of Defendants' Motion for Summary Judgment*. Filed by all defendants. (Related document(s) 38) (Sercombe, Timothy) (Entered: 10/16/2003) |
| 10/16/2003 | 62 | Reply to Motion *in Support of Partial Summary Judgment*. Filed by all plaintiffs. (Related motion(s) 43) (pvh,) (Entered: 10/17/2003) |
| 10/16/2003 | 63 | Declaration of *T. Chad Plaster*. Filed by all plaintiffs. (Related documents(s) 62) (pvh,) (Entered: 10/17/2003) |
| 10/23/2003 | 64 | **CIVIL MINUTES:** Record of Order – The court is resetting the oral argument on Plaintiffs' Motion for Partial Summary Judgment (#43) and Defendants City of Lake Oswego and Sandy Ingall's Motion for Summary Judgment (#38) from 11/3/2003 to 11/10/2003 at 01:30PM in Portland, in Courtroom 9A. By Judge |

Garr M. King. (Related documents(s) 43, 38) (ecp,) (Entered: 10/23/2003)

11/10/2003 65 **ORDER:** Record of Oral Argument before Judge Garr M. King. Counsel present for Plaintiff: Stephen Crew and Chad Plaster. Counsel present for Defendant: Timothy Sercombe and Kara Sahler. Court Reporter: Diana Stelzig. Order – Taking Defendant's Motion for Summary Judgment (Related Doc #38) and Plaintiff's Motion for Partial Summary Judgment (Related Doc #43) Under Advisement. (ecp,) (Entered: 11/10/2003)

11/12/2003 66 **CIVIL MINUTES:** Record of Telephone conference before Judge Garr M. King. Counsel Present for Plaintiff: Douglas Bragg, Stephen Crew and Chad Plaster. Counsel Present for Defendant: Timothy Secombe. Court Reporter: Nancy Walker. Pretrial Conference reset from 11/24/2003 to 4/12/2004 at 02:30 PM in Portland, in Courtroom 9A. 2-day Jury Trial reset from 12/2/2003 to 4/20/2004 at 09:00 AM in Portland, in Courtroom 9A. (ecp,) (Entered: 11/12/2003)

11/13/2003 67 Motion to Withdraw or Substitute an Attorney. Filed by all plaintiffs. (pvh,) (Entered: 11/14/2003)

11/13/2003 68 Declaration of *T. Chad Plaster in Support of Motion of Leave to Withdraw.* Filed by all plaintiffs. (Related document(s) 67) (pvh,) (Entered: 11/14/2003)

11/18/2003 69 **ORDER:** Record of Order – Granting Motion by Plaintiffs' Attorneys For Leave to Withdraw (Related doc #67). Attorneys Stephen F. Crew and T. Chad

Plaster of Ramis Crew Corrigan & Bachrach are withdrawn from the case. By Judge Garr M. King (ecp,) (Entered: 11/18/2003)

11/18/2003 70 Notice of Address Change of Counsel, Douglas M. Bragg. Filed by G.K. Ltd. Travel, Ramsay Signs, Inc., WH Gillison. (pvh,) (Entered: 11/21/2003)

11/25/2003 71 Notice of Entry of Appearance and Notice re: Scheduling Conference. Filed by G.K. Ltd. Travel, Ramsay Signs, Inc., (pvh,) (Entered: 11/28/2003)

12/08/2003) 72 Transcript of Oral Argument on Cross Motions for Summary Judgment Proceedings held on November 10, 2003 before Judge Garr M. King. Court Reporter: Diana L. Sweeney. (pvh,) (Entered: 12/09/2003)

12/18/2003 73 Motion for Extension of Time *to File Amended Reply*. Filed by G.K. Ltd. Travel, Ramsay Signs, Inc.; WH Gillison. (pvh,) (Entered: 12/19/2003)

12/18/2003 74 Memorandum in Support *of Plaintiffs' Motion for Extension of time to File Amended Reply*. Filed by G.K. Ltd. Travel, Ramsay Signs, Inc., WH Gillison. (Related document(s) 73) (pvh,) (Entered: 12/19/2003)

12/18/2003 75 Affidavit of *Thomas Claus*. Filed by G.K. Ltd. Travel, Ramsay Signs, Inc., WH Gillison. (Related document(s) 73) (pvh,) (Entered: 12/19/2003)

12/18/2003 76 Affidavit of *John F. Winston*. Filed by G.K. Ltd. Travel, Ramsay

* * *

Filed by G.K. Ltd. Travel, Ramsay Signs, Inc., WH Gillison. (Related document(s): Motion to Vacate 112.) (rtrb,) (Entered: 04/20/2004)

04/20/2004 115 Record of Order – Plaintiffs' Motion to Vacate Opinion and Related Orders Based Upon Defendants' Affidavit Made in Bad Faith (#112) is denied as untimely. No additional motions regarding the Opinion (#105) and Order (#106) filed on March 30, 2004 shall be filed. In accordance with previous orders of the court, the parties shall submit a proposed judgment forthwith. Ordered by Judge Garr M. King. 105, 106, 112. (ecp,) (Entered: 04/20/2004)

04/30/2004 116 Judgment Plaintiffs' and Defendants' Cross-Motions for SUmmary Judgment are granted in part and denied part. See 3 page judgment. Signed on 4/30/04 by Judge Garr M King. (ljl,) (Entered: 05/05/2004)

05/10/2004 124 Notice of Appeal to USCA – 9th Circuit from Order entered 3/30/04 and judgment entered 4/30/04. Filing fee in amount of $255.00 collected; Receipt No. 174410 issued. Filed by all plaintiffs. (Related Document(s): Order on motion for summary judgment,,,,,,, 106, Judgment 116) (tomg,) (Entered: 05/18/2004)

05/10/2004 125 Representation Statement. Filed by all plaintiffs. (Related Document(s): Notice of Appeal, 124 (tomg,) (Entered: 05/18/2004)

05/11/2004 117 Motion for Preliminary Injunction/Injunction pending Appeal against Enforcement of Sign Code Pending Appeal. Filed by G.K. Ltd. Travel, Ramsay Signs, Inc., WH Gillison. (rtrb,) (Entered: 05/12/2004)

05/11/2004 118 Memorandum in Support of their Motion for Stay Pending Appeal. Filed by G.K. Ltd. Travel, Ramsay Signs, Inc., WH Gillison. (Related document(s): Motion for Preliminary Injunction 117.) (rtrb,) (Entered: 05/12/2004)

05/11/2004 119 Unsworn Declaration of Attorney John F. Winston in Support of Motion for Stay. Filed by G.K. Ltd. Travel, Ramsay Signs, Inc., WH Gillison. (Related document(s): Motion for Preliminary Injunction 117.) (rtrb,) (Entered: 05/12/2004)

05/11/2004 120 Request for Expedited Ruling on Motion for Preliminary Injunction/Stay Pending Appeal. Filed by G.K. Ltd. Travel, Ramsay Signs, Inc., WH Gillison (rtrb,) (Entered: 05/12/2004)

05/13/2004 121 Response in Opposition *to Plaintiffs' Request for a* to Motion for Preliminary Injunction 117. Filed by all defendants. (Brown, Stuart) (Entered: 05/13/2004)

05/14/2004 122 **ORDER:** Signed on 5/14/2004 by Judge Garr M King. Denying Motion for a Preliminary Injunction 117) and Granting Plaintiffs Request for Expedited Ruling on Motion for Preliminary Injunction/Stay Pending Appeal (#120). (Hickman, Camile) (Entered: 05/14/2004)

05/14/2004 123 Bill of Costs. Filed by all defendants. (Brown, Stuart) (Entered: 05/14/2004)

| | | |
|---|---|---|
| 05/18/2004 | | Notification of Appeal mailed to USCA – 9th Circuit and to counsel along with copy of docket sheet. CADS and Representation Statement mailed to Court of Appeals. (Related Document(s): Notice of Appeal, 124) (tomg,) (Entered: 05/18/2004) |
| 05/24/2004 | 127 | Order from USCA – 9th Circuit, re: notification of case number CA 04-35416 for appeal filed 5/10/04, and briefing schedule. (Related Document(s): Notice of Appeal, 124) (tomg,) (Entered: 05/31/2004) |
| 05/27/2004 | 126 | Objections to Cost Bill. Filed by all plaintiffs.(ljl,) (Entered: 05/28/2004) |
| 06/08/2004 | 128 | Transcript Designation: None Requested. Filed by G.K. Ltd. Travel. (tomg,) (Entered: 07/01/2004) |
| 08/03/2004 | 129 | Certificate of Record transmitted to USCA for the 9th Circuit re Notice of Appeal CA 04-35416 filed by G.K. Travel Ltd. on 5/10/04 124. (Related Document(s): Notice of Appeal, 124) (tomg,) (Entered: 08/03/2004) |
| 08/12/2004 | 130 | **OPINION and ORDER.** Based on the documentation provided by defendants in support of their cost bill, costs are awarded as follows: $4,176.71 for photocopies, $898.50 for court reporter costs, and $374.30 for transcript costs for a total of $5,449.51. |

* * *

# APPENDIX J

**Court of Appeals No. 04-35416**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**GK LTD., TRAVEL, an Oregon Corporation, WILLIAM H. GILLISON; KATHLEEN KUSUDO, and RAMSAY SIGNS, INC., an Oregon Corporation,**

**Plaintiffs-Appellants**

**vs.**

**SANDY INGALLS and CITY OF LAKE OSWEGO,**

**Defendants-Appellees**

**EMERGENCY MOTION FOR ENTRY OF STAY PENDING APPEAL**

Appeal from Final Judgment of the
United States District Court,
District of Oregon (Hon. Garr M. King)
Dist. Ct. No. 3:02-CV-1147 KI

John Fogerty Winston
22211 SW Pacific Hwy 99W
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9347 SW Tonopah St.
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(971) 219-3297

Attorneys for Plaintiffs-Appellants

* * *

**If you view the full docket online, you will be charged for 8 Pages $ 0.64**

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**US Court of Appeals for the Ninth Circuit**
**Case Summary**

Court of Appeals Docket #: 04-35416 Filed: 5/18/04
Nsuit: 3440 Other civil rights (Fed)

G.K. Ltd. Travel, et al v. City of Lake Oswego, et al
Appeal from: District of Oregon (Portland)

Lower court information:
District: 0979-3 : CV-02-01147-GMK
presiding judge: Garr M. King, District Judge

| | |
|---|---|
| 12/13/04 | Filed original and 15 copies's reply brief (Informal; NO) 28 pages; served on 12/6/04 with minor defcy: (Blue covers). Notified counsel. [04-35416] (mhf) |
| 12/23/04 | Received aplts' satisfaction of (minor) brief deficiency of reply brs (Grey covers) [04-35416] (mhf) |
| 2/1/05 | Filed order (Edward LEAVY, Marsha S. BERZON,): denying appellant's motion for clarification. NO FURTHER MTNS FOR CLARIFICATION OR RECONSIDERATION OF THE DENIAL OF A STAY PENDING APPEAL WILL BE FILED OR ENTERTAINED. This cae is ready for calendaring. [04-35416] (mhf) |
| 3/2/05 | Calendar check performed [04-35416] (th) |
| 6/22/05 | Calendar materials being prepared. [04-35416] [04-35416] (th) |
| 6/27/05 | CALENDARED: Portland Sept 15 2005 9:00 a.m. Courtroom 16 ***Time change to 9:30 a.m. *** [04-35416] (th) |
| 9/15/05 | ARGUED AND SUBMITTED TO Raymond C. FISHER, Ronald M. GOULD, Carlos T. BEA [04-35416] (ms) |
| 1/26/06 | FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Raymond C. FISHER, author; Ronald M. GOULD; Carlos T. BEA.) FILED AND ENTERED JUDGMENT. [04-35416] (mhf) |

**Court of Appeals No. 0435416**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**GK LTD., TRAVEL, an Oregon Corporation, WILLIAM H. GILLISON; KATHLEEN KUSUDO, and RAMSAY SIGNS, INC., an Oregon Corporation,**

**Plaintiffs-Appellants**

**vs.**

**SANDY INGALLS and CITY OF LAKE OSWEGO,**

**Defendants-Appellees**

**EMERGENCY MOTION FOR ENTRY OF PRELIMINARY INJUNCTION PENDING APPEAL**

(Filed May 19, 2003)

Appeal from Final Judgment of the
United States District Court,
District of Oregon (Hon. Garr M. King)
Dist. Ct. No. 3:02-CV-1147 KI

John Fogerty Winston
22211 SW Pacific Hwy 99W
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Attorneys for Plaintiffs-Appellants

* * *

forums. *Thomas* at 323, 324 *and Niemotko v. Maryland*, 340 U.S. 268, 271 (1951).

The purpose of the City's prior restraint scheme is to ban plaintiffs' medium of protected speech and to condition future speech on obtaining a permit or variance from a public official provided that the applicant pleases the specific individual aesthetic taste of that official. Under these circumstances the application of the *non-conforming sign* provisions of the code, coupled with the "amortization" ban of the historical pole sign medium of expression, trigger a prohibition against continuing enjoyment of protected speech unless the speaker first obtains permission to speak under the City's permitting or variance procedures. (App. at pp. 194-211) Enforced in conjunction with each other by the City, these provisions convert the entire code into an unconstitutional prior restraint scheme conditioning the right to speak on content of the message, without any mandatory protections necessary to support such a scheme.

## B. Irreparable Harm

> Where plaintiffs seeking a preliminary injunction demonstrate a high probability of success on the merits, they need demonstrate only the possibility of irreparable harm as part of the balancing of the hardships. *See Bernard v. Air Line Pilots Ass'n, Int'l.*, 873 F.2d 213, 217 (9th Cir. 1989) ("Where a party can show a strong chance of success on the merits, he need show only a possibility of irreparable harm.").

*Sammartano, supra*, at p. 973.

The City's April 27, 2004 letter demands that plaintiffs and all others in the City cease using protected expression contained on the medium of pole signs effective May 22, 2004. (App. 212). Again, *Sammartano* is controlling in determining whether that demand constitutes irreparable harm:

> "the loss of First Amendment freedoms, for even minimal periods of time unquestionably constitutes irreparable injury" for purposes of the issuance of a preliminary injunction. *Elrod v. Burns*, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976); *see also S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1148 (9th Cir. 1998). . . . "Under the law of this circuit, *a party seeking preliminary injunctive relief in a First Amendment*
>
> * * *

---

**APPENDIX K**

**No. 0435416**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**GK LTD., TRAVEL, an Oregon Corporation, WILLIAM H. GILLISON; KATHLEEN KUSUDO, and RAMSAY SIGNS, INC., an Oregon Corporation,**

**Plaintiffs-Appellants**

**vs.**

**SANDY INGALLS and CITY OF LAKE OSWEGO, a Municipal Corporation,**

**Defendants-Appellees**

# APPELLANTS' OPENING BRIEF

Appeal from Final Judgment of the United States District Court, District of Oregon (Hon. Garr M. King)
Dist. Ct. No. 3:02-CV-1147-KI

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Attorneys for Plaintiffs-Appellants

* * *

of entry of a final judgment. plaintiffs requested a stay of enforcement of the sign code pending appeal on May 11, 2004. (ER 408) The request was denied on May 14, 2004. (ER 409).

**2) Challenge to void judgment.**

There is no time limit on judgments entered outside of the court's jurisdiction.

## II. ISSUES PRESENTED FOR REVIEW

1. Whether the city sign code imposes unconstitutional restrictions on the plaintiffs' First Amendment commercial expression as applied to them. (1st and 2nd Claims for Relief) (ER 2-5)

2. Whether the city sign code unconstitutionally bans an unique medium of speech. (3rd and 4th Claims for Relief) (ER 36-41)

3. Whether the city sign code unconstitutionally regulates non-commercial speech on the basis of content or viewpoint. (8th and 9th Claims for Relief) (ER 12-17)

4. Whether the city sign code unconstitutionally regulates commercial speech. (10th Claim for Relief) (ER 5)

5. Whether the city sign code unconstitutionally regulates non-commercial speech. (11th Claim for Relief) (ER 6)

6. Whether the city sign code unconstitutionally grants preferential treatment to commercial speech over non-commercial speech. (12th Claim for Relief) (ER 6-7)

7. Whether the city sign code imposes unconstitutional prior restraints on the speakers. (13th and 14th Claims for Relief) (ER 30-36)

8. Whether the city sign code is unconstitutionally vague. (17th Claim for Relief) (ER 9-10)

9. Whether the district court exceeded its jurisdiction and entered a void judgment under F.R.Civ.P. Rule 56, where a jury trial has been demanded and there is conflicting evidence in the record. (ER 376-385)

## III. STATEMENT OF THE CASE

### A. Nature of the Case

The plaintiff-appellants, G.K. Ltd. Travel ("GK Travel") and Ramsay Signs, Inc. ("Ramsay") are two Oregon businesses presenting lawful, commercial speech through the medium of a pole sign located on GK Travel's property in the City of Lake Oswego, an Oregon city. (ER 44) The defendant-appellees are the City of Lake Oswego municipal government ("city") and Ms. Sandy Ingalls ("Ingalls"), a former sign code enforcement officer. (ER 1)

In 2001, GK Travel moved its operations from an office building in a nearby city to an office in the city of Lake Oswego. (ER 45) The new office is a self-

* * *

# APPENDIX L

## UNITED STATES DISTRICT COURT

## DISTRICT OF OREGON

| | | |
|---|---|---|
| **G.K. LTD, TRAVEL**, an Oregon corporation, **WH. GILLISON, KATHLEEN KUSUDO** and **RAMSAY SIGNS, INC.**, an Oregon corporation, | ) | |
| **PLAINTIFFS,** | ) | Case No. CV 02-1147-KI |
| v. | ) | |
| **CITY OF LAKE OSWEGO**, and **SANDY INGALLS,** | ) | |
| **DEFENDANTS.** | ) | |

* * *

**AGENDA**
**CITY OF LAKE OSWEGO PLANNING COMMISSION**
**CITY COUNCIL CHAMBERS, CITY HALL, 380 'A' AVENUE**

**Monday, February 8, 1993**

**7:00 P.M.**

CALL TO ORDER

ROLL CALL

APPROVAL OF MINUTES

October 12, 1992

PUBLIC HEARING

**PA 6-92**, a request by City of Lake Oswego for approval to amend the City's Urban Services Boundary (USB) to include the subject parcel within the USB and apply City Comprehensive Plan Designation of R-10. The site is located at 6425 Childs Road [Tax Lot 12,400 and adjacent right-of-way on Meridian (a.k.a. 65th) of Tax Map 2 1E 19BB]. Staff coordinator is **Jane Heisler, Associate Planner.**

**DA 4-92**, a request by City of Lake Oswego to amend 1985 Lake Oswego Sign Code (Chapter 47) to eliminate portions which could be unconstitutional. The Code will be reformatted, but there will be few substantive changes. Staff coordinator is **Robert Galante, Senior Planner.**

GENERAL PLANNING

OTHER BUSINESS – Findings, Conclusions and Order

SUBCOMMITTEE REPORTS

ADJOURNMENT

CITY OF LAKE OSWEGO
[LOGO]
OREGON

DEPARTMENT OF PLANNING AND DEVELOPMENT

**MEMORANDUM**

TO: Planning Commission Members

FROM: Robert Galante, Senior Planner

SUBJECT: 1993 Sign Code

DATE: January 29, 1993

## ACTION

The Commission is requested to evaluate the proposed new Sign Code, to consider public input, and to recommend any changes necessary prior to forwarding the Code to the City Council for their review. The Commission's recommendation will be forwarded to Council along with all public testimony and evidence submitted on this issue.

## BACKGROUND

The proposed 1993 Sign Code, enclosed as Exhibit 1, is the second draft of the code. The first draft was reviewed by the Planning commission in a workshop held on January 11, 1993.

This Sign Code was principally designed to undo the unconstitutional aspects of the preceding Sign Code (the 1985 Sign Code, attached) and to complete a portion of the Kruse Way Annexation Agreement that required modification of the City's Sign Code. Parts of the 1985 code have been determined to be unconstitutional because of First Amendment rights restricting our ability to regulate

signage based on the signs message or content. The result of this effort is a code that looks very different than the old one, but does not substantially change sign size or placement.

## CITIZEN INVOLVEMENT

The Planning Commission held a public workshop on the proposed sign code on January 11, 1993. In addition, the code was revised in a public meeting of the East End Development Committee (EDC) on January 7, 1993. The Lake Oswego Chamber of Commerce Land Use Committee reviewed the document at their meeting of January 20, 1993 and a review is scheduled with the Lake Oswego West Business Association Committee on February 2, 1993. DLCD code and all City Neighborhood Associations have been provided notice of the proposed new code and all City Neighborhoods will be mailed this report together with this revised draft. A copy has also been forwarded to John Shonkwiler who represents the interests of Hillman Properties (Kruse Woods) to insure that the Kruse Way Annexation Agreement is completed as required. Copies of correspondence received to date are attached as Exhibits 3 through 9.

Additional opportunities for citizen input will be available through the public hearing scheduled before the Planning Commission and a public hearing that will be scheduled before City Council.

## RELEVANT PLAN POLICIES AND STATE GOALS

Social Resource General Policy I states that "The City will review and protect features valuable to community identity and preserve the natural and aesthetic qualities which

are the pride of residents." Specific Policy 6 intended to implement the General Policy, states:

> **"Encourage design of public and private facilities and structures which enhance community beauty, including:**
>
> **a. Aesthetic signs which do not intrude on space of adjacent activities.**
>
> **b. Design criteria which encourage a "village atmosphere: in business districts, and buildings to scale with neighborhood and adjacent uses."**

Additional policies which support the aesthetic review of signs include:

- Social Resource General Policy V: Strengthen Neighborhood identity.
- Residential Site Design General Policy I: The City will require new residential development of four or more units to meet minimum criteria for overall site design which include ... (for R-0, R-3 and R-5 zones) minimum criteria for:

  k. Building appearance and aesthetic amenities.

- Commercial Land Use General Policy V: Assure minimum commercial intrusion on residential areas.

These policies generally encourage aesthetic review to insure a minimum of sign clutter, to minimize the appearance of strip commercial development, to encourage a

village atmosphere and to assure minimum intrusion of lighting and other impacts of signs on residential areas. The new sign code proposal addresses each of these items.

State Goal I (Citizen Involvement) is met by the process described previously in this report under "Citizen Involvement." State Goal 2 (Land Use Planning) has been met by the existing Comprehensive Plan which establishes policies to guide land use decisions. No other State Goals are directly applicable to the proposed code; however, Goal 9 (Economic Development) is supported by the proposal because it provides an opportunity for areas designated for commercial and industrial development to provide the signage necessary to operate businesses.

* * *

**Exhibit 5/Exhibit 2**

## CHAPTER 47.

## SIGN REGULATIONS


| | |
|---|---|
| 47.005 | Title |
| 47.010 | Purpose |
| 47.015 | Definition |
| 47.020 | Permit Required |
| 47.025 | Non-Conforming Signs |
| 47.030 | Penalties, Nuisance |
| 47.035 | Area of Signs |
| 47.100 | Prohibited Signs |
| 47.105 | Construction and Design Standards for Permanent Signs |
| 47.110 | Permanent Signs Exempt From Permit and Fee |
| 47.115 | Temporary Signs Exempt From Permit and Fee |
| 47.120 | Special Event Signs Requiring Permit |
| 47.125 | Permanent Signage Requiring Permit Allowed in Residential Zones (R-0, R-3, R-5, R-7, 5, R-10, DD and WR) |
| 47.130 | Permanent signage Requiring Permit Allowed in Commercial Zones (GC, EC and NC) |
| 47.135 | Permanent Signage Requiring Permit Allowed in Commercial Zones (MC, CR & D and OC) |
| 47.145 | Permanent Signage Requiring Permit Allowed in Industrial Zones (IP) |
| 47.150 | Institutional, Public Facilities or Open Space Land Uses Listed As Conditional Nonconforming Uses |
| 47.155 | Variances |

**47.005 Title** **47.005**

This chapter is entitled "Sign Code of the City of Lake Oswego".

**47.010 Purpose** **47.010**

The City Council finds that to protect the health, safety, property and welfare of the public, to provide the neat, clean, orderly and attractive appearance of the community, to improve the effectiveness of signs, to provide for safe construction, location, erection, and maintenance of signs, to prevent proliferation of signs and sign clutter, and to minimize adverse visual safety factors to travelers on public highways and on private areas open to public travel, it is necessary to regulate the design, quality of materials, construction, location, electrification, illumination and maintenance of signs visible from public property, public rights-of-way and private areas open to public vehicular travel.

This chapter shall be construed to carry out the above-stated purpose, but shall not be construed to permit the erection or maintenance of any sign at any place or in any manner unlawful under any other City Code provisions or other applicable law. (Ord. No. 789, Sec. 1; 12-5-61. Ord. No. 1921, Sec. 2; 7-2-85. )

(Rev. 7 2 85; m)

**EXHIBIT 8**

CITY OF LAKE OSWEGO

October 5, 1993

CITY COUNCIL MINUTES

Study Session

I. CALL TO ORDER

Council President Heather Chrisman called the study session of October 10, 1993 to order at 5:30 p.m. in the City Council Chambers.

II. ROLL CALL

Councilors June, Klammer, Puskas, Anderson, Holstein and Council President Chrisman were present; Mayor Schlenker was excused. Staff present included City Manager Doug Schmitz, City Recorder Kris Hitchcock, City Attorney Jeff Condit, Police Chief Les Youngbar, and LOCOM Supervisor Kathy Alford. Also present were West Linn City Councilors John Moss and Tim Wood, and West Linn Police/Fire Chief Jody Hart.

III. STUDY SESSION

A. Computer Aided Dispatch (CAD)

*Kathy Alford, LOCOM Supervisor* reported to the Council and made the following points:

- The goal of the CAD program was to increase efficiency and the ability to measure efficiency within the Center;
- Directed Council's attention to a flowchart comparing how a call was taken on the manual system versus a call taken on the CAD system;

* * *

Association of Realtors, testified and made the following points:

- She represented almost 600 realtors in the Lake Oswego area;
- Verified that the revisions meant the following:
    - The restriction to six square feet was per sign (most real estate signs were two-sided);
    - The sign had to be removed within 15 days of the closing of a sale, not acceptance of an offer;
    - Directional signs could be no more than four square feet per side;
    - All signs would have to written on them the date on which they were placed:
- Asked for clarification of Section 47.115(A)(2) (p. 9) regarding what signs were allowed in the public right of way.

Mr. Galante stated that the provisions on signs extending into the public right of way referred to temporary signs requiring a permit, and that real estate signs were the type of sign not requiring a permit. He explained to the Council that the language in the code which mentioned specific types of signs was solely for the purpose of helping citizens to locate the code provisions which applied to their signs; signs were not regulated based on content.

Ms. Zielinski continued her testimony:

- Suggested allowing leeway for signs which allowed safe passage;

- Asked for the elimination of the provision requiring the writing of the date of placement on the sign, contending that the writing would be unsightly and expensive to maintain (p. 10 #4);
- How could a sign be erected on one street of a corner property and not be visible from the other street (p. 10, 1B);
- Especially requested that the restriction of a temporary sign to four square feet (Section C) be changed, as most real estate signs were six square feet and realtors would have to invest up to $10 a sign (three to six signs per realtor) to comply with this change;
- The restriction on covering not more than 10% of a window in a residential area would eliminate effective For Sale signs in condominium windows, the only place to put such a sign.

Councilor Holstein asked if the realtors did any internal policing of offending signs. Ms. Zielinski stated that members of the association were encouraged to remove each other's offending signs.

*Don Brenamin 9565 SW Milling, Tigard*, representing the Oregon Electric Signs Association (OESA), testified and made the following points:

- The OESA would have been happy to give input regarding the effects these changes in the sign code would have but they were not notified until recently;
- Suggested implementation of a "freeway zone" in which larger than usual signs were

allowed because of the specific requirements of freeway signage to be readable;

- A maximum of a 32 square foot sign would not allow a gas station owner to display the brand name in addition to the state mandated display of prices;
- The two foot band requirement could reduce the creativity and legibility of a sign, especially one with a corporate logo;
- Suggested expanding wall signage to exclude a constraint to a specific height, perhaps setting up percentage of a wall or elevation;
- Window signage was a necessary and effective form of advertising for grocery stores and other businesses, and regulating it would be difficult to enforce and place a burden on the business owners;
- Warned the Council that requiring businesses to replace expensive nonconforming signs (even over a five year period) was a "hot potato" and would be difficult to regulate.

INDIVIDUALS

*Greg Stewart, owner of Mailboxes, Etc. at 333 S. State Street*, testified and made the following points:

- As he understood the code, he was not allowed to have a banner at his store to reinforce newspaper and direct mail advertisements of the annual customer appreciation sale;

- He agreed with the need for regulation but felt banners should be allowed other than simply at a grand opening;
- Commented on the lack of consultation with the Oregon Electric Sign Association, and asked where did the sign dimensions listed in the provision come from.

Councilor June asked how Mr. Stewart would string up a banner if he were allowed one. Mr. Stewart stated he would hang it over the awning in the Lake Place Shopping Center once a year during the national sale (30 day period).

Mr. Condit explained that under the new sign code (47.120), Mr. Stewart could apply for a banner, subject to compliance with the code provisions, though under the current unconstitutional code he could not do so.

Mr. Stewart apologized if he had misinterpreted the code but contended it was unclear and confusing.

*Jerry Weaver, lessee of the Lake Oswego Arco, 608 N. State Street*, testified and made the following points:

- Explained that service stations made most of their money off of peripheral sales, such as a mechanic shop, mini-mart, etc;
- Window signage was their only way of advertising specials or services to their drive-in customers, and of reinforcing their neighborhood direct mail advertising;
- Restricting signage to 25% of the window would render their advertising ineffective;
- Asked that businesses be looked at individually, not lumped together as a group.

Councilor Holstein asked what the average amount of window coverage in his business had been over the past year. Mr. Weaver said approximately 60% of his windows were covered, depending on what the mechanic was doing (an independent contractor renting space at the station).

Councilor Anderson asked if a monument sign would not accomplish the same thing. Mr. Weaver stated that he had no logical place to put such a monument sign without blocking traffic.

*Karl Rohde, 654 Ridgeway Road*, testified and made the following points:

- Asked if the window coverage referred to the total amount of windows on the building or to individual windows:
    - Staff explained that it referred to individual windows;
- Sign codes were necessary to prevent visual degradation in cities;
- Considered that the changes made for constitutional compliance were good;
- Believed that the enforcement and continued implementation of restrictive sign codes benefitted businesses rather than hurt them through the creation of a more pleasant visual atmosphere for the shopper;
- Concurred that there was validity to the idea of a "freeway zone";
- The changes in the provision on the two foot band limitation (as recommended by

Mr. Coffee) would be difficult to regulate because it required subjective decisions

*Mike Carrolley, Oregon Electric Sign Association, 3914 SE Pine, Portland,* testified and made the following points:

- As a member of the OESA, he specialized in working with governing bodies to develop workable sign codes from the business owner's, the customer's, and the city's perspectives;
- On behalf of the OESA, he urged Council not to vote on this until the Association could work with the city on a sign code.

Councilor June asked how quickly could the OESA make recommendations (within one to two weeks). Mr. Carrolley said allowing two weeks to make comments was better than passing it tonight because of the flaws (both legal and industry standard) they saw in the code.

No one else wishing to testify, Council President Chrisman closed the hearing to public testimony.

Mr. Galante responded to some of the issues raised in testimony and made the following points:

- Staff did not work with the sign industry people because the revisions were intended to be very few and to address primarily concerns in the Kruseway corridor and to make the code constitutional;
- The sign dimensions in the new code were the same as the dimensions in the old code (which were based on industry recommendations at the time of passage);

- Staff expected further opportunity to work with the sign industry on future code revisions.

Councilor Holstein asked if the four square feet for a temporary sign was a change from the old code. Mr. Galante said that the four square foot sign was intended to be a A-frame sign displaying the word "Open" (without a company logo).

Councilor Holstein asked if there was a phase-in period for these revisions. Mr. Galante stated that the effective date of the order was 30 days after adoption.

Councilor Holstein explained that Council needed to approve this sign code in order to proceed with the Kruseway annexation but that they saw the need for further work to correct some of the problems mentioned, like the "freeway zone".

Councilor Anderson moved for approval of the draft of the 1993 sign code, as amended and corrected by staff. Councilor Puskas seconded the motion.

Councilor June concurred that it was important to move ahead with this, and noted that this did not foreclose the OESA from making recommendations.

Councilor Puskas acknowledged the legitimate concerns raised by citizens tonight regarding the sign code but stated that she would like to see a more restrictive sign code when the issue was revisited.

Councilor Chrisman concurred with Councilor Puskas regarding the aesthetics of Lake Oswego and expressed interest in a more

restrictive sign code in terms of liveability issues and the need for pedestrian friendly signs.

A roll call vote was taken and the motion passed with Councilors June, Klammer, Puskas, Anderson, Holstein, and Council President Chrisman voting in favor.

VII. BUSINESS FROM THE COUNCIL

A. Proclamation of October 16 as World Food Day

Council President Chrisman read the proclamation declaring October 16 as World Food Day.

B. Proclamation of October as Disability Employment Awareness Month

Council President Chrisman read the proclamation declaring October as Disability Employment Awareness Month.

C. Councilor Puskas reminded those present of the East End Development Town Hall meeting on October 14 at the main fire station.

D. Councilor Holstein requested staff to ask the Natural Resources Commission to forward to Council their draft of the street tree ordinance.

E. Councilor Holstein asked staff to look into the coor nation of traffic signals on Kruseway, Boones Ferry, and A Street.

The City Manager stated that staff would bring back a report on traffic signals.

VIII. REPORTS

A. Consideration of prohibition of the right turns from State Street onto D and E Avenues.

*Ron Peterson, 890 F Avenue*, addressed the Council and made the following points:

- The stop signs have caused a change in traffic patterns in First Addition (more traffic on C Avenue);

* * *

**PLAINTIFF'S EXHIBIT C**

**MEMORANDUM**

**To:** City of Newberg Planning Commission

**From:** Jeffrey G. Condit, Miller Nash Wiener Hager & Carlsen [/s/ JGC]

**Subject:** Legal Issues in Sign Code Drafting

**Date:** April 9, 1998

City Attorney Terry Mahr asked me to give you a brief overview of the major legal issues facing a local government embarking on reviewing or amending its sign regulations.

## I. OREGON CONSTITUTION ARTICLE I SECTION 8-PROHIBITION ON CONTENT BASED REGULATION

Oregon Constitution Article I Section 8 states:

> *No law shall be passed . . . restricting the right to speak, write, or print freely on any subject whatever. . . .*

Beginning with *State v. Spencer*, 298 Or 255, 661 P2d 1147 (1980), the Oregon appellate courts have interpreted this language different from – and much more broadly protective of speech than – U.S. Supreme Court's analysis of the First Amendment.

***Ackerley***. In *Ackerley Communications, Inc. v. Multnomah County*, 72 Or App 617, 696 P2d 1140 (1985), the Court of Appeals held that the Article I Section 8 language prohibiting restrictions on the right to speak "on any subject whatever" prohibits content-based distinctions in the

way speech is regulated. The Court therefore invalidated the County billboard ordinance that regulated only commercial billboards. The Court expressly rejected the County's argument that Oregon should adopt the First Amendment distinctions between regulation of commercial and non-commercial speech articulated in *Metromedia.*

The *Ackerley* decision forecloses a local government's ability to enact regulatory distinctions among signs based on content.

Although *Ackerley* has never been expressly validated by the Supreme Court, the Supreme Court reached basically the same conclusion in *Moser v. Frohnmayer*, 315 Or 372, 845 P2d 1284 (1993). In *Moser*, the Supreme Court concluded that a regulatory distinction between commercial and non-commercial speech is a regulation directed at content, does not come within an historically recognized exception, and therefore is unconstitutional. The Court therefore overturned a state statute regulating automatic dialing devices for commercial solicitation that exempted charitable and religious solicitations. 315 Or at 376-380.

Basic Rule: If you have to read the sign to regulate it, the regulation is content-based and therefore unconstitutional.

* * *

**EXHIBIT 16**

[LOGO] CITY COUNCIL STUDY SESSION MINUTES
**September 14, 1999**

Council President Karl Rhode called the City Council study session to order at 6:00 p.m. on September 14, 1999, in the City Council Chambers.

Present: Councilors Chizum, Hoffman, Council President Rohde and Schoen were present. Mayor Klammer, Councilors Prosser and Lowrey were excused.

Staff Present: Doug Schmitz, City Manager; David Powell, City Attorney; Kristi Hitchcock, Public Affairs Director, Robyn Christie, Deputy City Recorder; Tom Coffee, Assistant City Manager; Hamid Pishvaie, Current Planning Manager; Stephanie Fiereck, Code Enforcement Specialist; and Morgan Tracy, Associate Planner.

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**3. STUDY SESSION**

**3.1 Results of 1998 Sign Inventory and Review of Possible Amendments to Sign Regulations**

Hamid Pishvaie, Current Planning Manager, explained that staff conducted the 1998 sign inventory of over 1,100 signs in order to complete implementation of the 1994 sign ordinance. He mentioned the countless hours put in by Stephanie Fiereck, Code Enforcement Specialist, in creating a useable inventory. He pointed out that staff needed Council direction on how to proceed with non-conforming signs.

Stephanie Fiereck, Code Enforcement Specialist, presented the six points relating to the sign ordinance for which staff needed guidance from Council. She discussed

* * *

Councilor Schoen spoke to imposing greater restrictions for more consistency. He did not support leaving the standard open because everyone interpreted it differently. He asked staff to review the sign options for the True Value building as an example. Mr. Pishvaie explained that the True Value building could have a sign band on the building along the street frontage and along the parking lot frontage that would be highly visible from the road. He pointed out that, in a building with multiple businesses, the business fronting the street might not need its name on the monument sign because it already had a sign band. Therefore, the other businesses could receive extra space on the monument sign.

Mr. Pishvaie confirmed to Councilor Chizum that each business in the True Value building with four businesses was entitled to a sign. He confirmed that an office building with multiple tenants listed the tenants' names on the inside directory, not on an outside sign.

Mr. Coffee pointed out that a monument sign could be a maximum of 32 square feet and 8 feet high. Ms. Fiereck indicated that the sign depicted was non-conforming. Mr. Coffee stated that under their current code the owner would have to reduce the sign size. He commented that an even more restrictive code made signs less available to the building tenants. He said that staff could look at ways to add additional flexibility and more design requirements.

Councilor Chizum spoke to leaving the sign policies as they were. He mentioned that the business people in the downtown wrote the restrictive downtown code for the kinds of signs they wanted, not the Planning Department.

Council President Rohde asked if the rock base of a monument sign was included within the 32 square foot maximum area. Staff confirmed that someone could put a 32 square foot monument sign on top of a two foot base as long as the total sign and base height did not exceed eight feet. Mr. Coffee commented that staff would question the design of a monument sign with a four foot base and probably not approve it.

Council President Rohde spoke to removing the subjective review section from the sign code. He said that business people have told him that they needed a sign code with a basic criteria to which they could adhere. He stated that they found this subjective review clause requiring signs compatible with other nearby signs, elements of street, site furniture, and adjacent structures to be one of the biggest problems with the code. He commented that it would be easier for a business person to let the Planning Department design the sign.

Mr. Coffee discussed the difficulty of legislating aesthetics and design. He pointed out that, even with specific standards, someone would come in with something that met the standards but still did not look right. He argued that, without the subjective review clause, staff had no ability to turn down any sign that ostensibly met the standard. He mentioned the tension between aesthetic quality and certainty.

Councilor Schoen argued that if they defined the aesthetic values well enough, it would work out. He cited Cannon Beach as an example of a community with a consistent sign code. Mr. Coffee said that staff could write specific standards for size, color, lettering, and materials which would make all the signs look alike. He pointed out that

look alike signs offended some people. He reiterated that staff could develop ideas if this was the Council's direction.

Councilor Chizum reiterated his concern with rewriting the code. He argued that removing the subjective review clause simply opened up another problem. He held that the City needed the ability to say that a sign was not "right." He mentioned the appeal process for those who disagreed.

Council President Rohde said that he wanted staff to clarify the code. Councilor Schoen stated that he still supported staff looking at the question. Councilor Hoffman agreed with Councilor Chizum. The Council agreed that staff would bring the issue back before the Council at another study session. They agreed that staff would write a brief memo discussing the issue.

Council President Rohde spoke to removing the phrase "to improve the effectiveness of signs" from the purpose section (page 47-2). He argued that people interpreted what that phrase meant in different ways. He commented that business people saw a flashing neon sign as more effective than a monument sign. He contended that having a goal of improving the effectiveness of signs meant doing whatever a business person wanted because he/she was the ultimate determiner of what was most effective for his/her business.

Mr. Coffee said that staff did not consider the purpose section as part of the regulations in the ordinance." Mr. Powell agreed that the purpose statement had little practical effect. He conceded that someone could try to use it in an interpretational issue.

Council President Rohde disagreed with Councilor Chizum that the business people wrote the sign code. Councilor Chizum said that the business people looked at the code. He reiterated that it was more important to enforce the existing code than to modifying the wording. Council President Rohde spoke to taking advantage of the opportunity to modify the sign code ordinance. Councilors Chizum and Schoen did not support changing the wording.

Mr. Coffee commented that the situation of someone arguing that the sign regulations reduced the effectiveness of his/her sign has never occurred. Council President Rohde held that it was possible.

Council President Rohde asked if a business owner had to pay the $115 sign permit fee for each of five logos placed in five different windows. Staff said yes, because according to the code each logo was a window sign. Council President Rohde commented that that seemed excessive. Staff indicated that they would look into it.

Council President Rohde asked if a business with three separate signs had to pay for three sign permits. Mr. Pishvaie explained that each of those three signs in a situation of a building with multiple tenants could have something different written on it He argued that three signs with the same verbiage for a single business did not negate the fact that they were three individual signs, each requiring a permit.

* * *

**EXHIBIT 22**

City Council Minutes
May 2, 2000

Councilor Rohde supported changing the ordinance.

Mayor Klammer spoke to taking steps to protect the more valuable trees, such as firs, cedars, etc., by not classing them with the "trash trees," such as, cottonwoods. He recommended sending this matter to the Natural Resources Advisory Board to find a resolution to the ongoing problems and dissension in the community with the tree code. He mentioned designating a dead tree as a Type 1 permit with a $7 fee instead of the $97 fee charged now. He commented that PGE could not replace the four trees on Fernwood hacked up by its contractor, even though it was willing to do so. He spoke to developing a tree ordinance that was palatable to citizens as a whole and employed common sense.

Councilor Chizum suggested that, following the Natural Resources Advisory Board's review, staff present several proposals for changes to Council with a vote on each proposal.

Councilor McPeak recounted an incident in which a neighbor of hers made an application for a tree cutting permit only to find that her tree would never meet the standards. She held that there should have been easy-to-read information available to her neighbor from which she could predict whether she had a chance of getting a permit, as opposed to going through the entire process. Mr. Schmitz commented that this was more of an administrative process than policy.

The Council agreed by consensus to send the tree code back to the Natural Resources Advisory Board.

### 8.1.2 Sign Ordinance

Mayor Klammer referenced the major dissatisfaction in the community with respect to the sign code. He suggested grandfathering in the 67 pole signs or giving them a different maturity date.

Councilor Chizum referenced his conversations with a businessman with respect to the sign ordinance. He discussed his suggestion to deal with the sign code enforcement problem by giving those people whose signs were out of compliance with the 1994 city-wide ordinance the same deadline date given to the East End people in 1998 to have conforming signs: 2005. He argued that if they grandfathered signs in, they would never achieve the look they wanted for the city. He pointed out that a businessman changed his sign only if the business changed or the sign did not work. He held that the idea that the grandfathered signs would eventually comply with the code did not work in actual practice.

Councilor Chizum argued that the way to get a sign code that would eventually be enforced was to extend the deadline date to 2005 for a consistent date throughout the city. He pointed out that the business people developed the sign code.

Mayor Klammer pointed out that the rest of the city, exclusive of the East End, has had since 1994 to bring their signs into compliance. He held that granting a deadline extension to the rest of the city would bring in the East End people complaining that the rest of the city

got four more years to comply. Councilor Chizum disagreed, citing his business contact who stated that most business people were unaware of the sign code. He reiterated that extending the deadline was a reasonable solution while grandfathering signs in created a hodgepodge of signs.

Councilor McPeak referenced her conversations with business people who believed that Lake Oswego went way beyond the sign code restrictions applied by other cities. She spoke in support of grandfathering in the pole signs as a sign of a warmer, more welcoming attitude from the Council towards business,

Councilor Schoen said that he would support grandfathering in the pole signs that were legal when installed. He spoke to requiring compliance from those who did not have a permit or had illegal signs.

Mayor Klammer said that he supported grandfathering in the 67 pole signs.

Councilor Chizum argued that grandfathering in 67 signs was throwing the sign ordinance in the wastebasket because all the signs in the city would never conform to the standards.

Councilor Rohde commented that grandfathering was good practice.

Councilor Lowrey argued that grandfathering in signs was the equivalent of not enforcing the sign ordinance. He held that grandfathering in some signs ignored the efforts made by those who spent money to comply with the ordinance. He spoke to enforcing the ordinances that the City spent much time and effort on developing, instead of changing them when a few people complained.

Councilor Lowrey contended that the Council sent an inconsistent message by helping the businesses while making little effort to help the neighborhoods with their issues. He suggested setting up something similar to the facade grant program to provide financial assistance to people needing to change their signs, if the Council was serious about making the city more inviting to business. He disagreed that Lake Oswego had strict sign standards.. He mentioned other cities in the U.S. that had consistent signs, indicating a good sign ordinance, such as Palm Desert.

Councilor Lowrey held that if Lake Oswego chose not to make the effort to improve, then it would be stuck with the uninviting commercial areas. He contended that they needed to stick to their guns if they wanted to reverse the 'dumpy' look of the commercial areas. He indicated to Councilor Chizum that he was willing to look at extending the deadline for compliance to 2005.

Mayor Klammer asked why Councilors Lowrey and Chizum considered grandfathering in the pole signs as "gutting the ordinance." Councilor Chizum held that grandfathering in a sign not in compliance with the current sign code effectively said that there was no sign code. He argued that the Council was listening to the wrong business people. He reiterated that the business people developed the sign code as something that the City and the business community could both live with. He said that he spoke with Mike Buck who thought his suggestion was a reasonable one. Councilor Lowrey confirmed that Mr. Buck was not for grandfathering in signs.

* * *

**EXHIBIT 26**

City Council Meeting Minutes
July 18, 2000

## COUNCIL DISCUSSION

**Councilor Rohde moved to enact Ordinance 2236 and authorize the City Recorder to mail the ordinance to Metro and all necessary parties, Councilor Schoen seconded the motion. A voice vote was taken and the motion passed with Councilors McPeak, Hoffman, Schoen, Mayor Klammer, Chizum, Rohde, and Lowrey in favor (7-0).**

- The Council considered Item 8.2, Councilor Items, at this time.

## 8. BUSINESS FROM THE COUNCIL

### 8.1 Sign Code – Pole Signs

**Stephanie Fiereck, Code Enforcement Specialist,** referenced her memo that was included in the agenda packet. She asked for direction from the Council on how to proceed with the non-conforming pole signs. She said that each of the 67 businesses received letters noting the May 2001 expiration date for non-conforming signs (extended from February 1999 by the Council earlier this year).

Mayor Klammer opened the meeting to public testimony.

- **Leslie Paratta, Bridgecourt**

Ms. Paratta spoke in support of sign control as major component of beautiful communities, such as Boulder, Colorado; Carmel, California and Cannon Beach, Oregon. She held that the Council in conjunction with a committee of business owners adopted the sign code as a means to

enhance the revitalized appearance of the downtown and to unclutter, the Boones Ferry business district. She argued that it was a mistake for the Council to back down now; appeasing some merchants was not in the best interests of the community. She asked the Council to make the best long-term decision for the community. She characterized pole signs as visual pollution. She mentioned that many residents have been waiting a long time for the beautification of the city. She reiterated that what was at stake was what was best for the community as a whole, not a special interest group.

- **Cathy Bashers, representing property owner of 16066 SW Boones Ferry Road (Lake Grove Plaza)**

Ms. Bashers spoke on behalf of the owner and most of the tenants of the Lake Grove Plaza. She mentioned the petition they signed to keep the existing pole signs. She noted that this 12 foot high pole sign dated back 25 to 30 years, yet was not outdated. The tenants feared that loss of the pole sign would reduce the visibility of their businesses, which were already set back from the road. She mentioned their concern with the expense also. She explained that a business did not always have money to spend on these things. She reiterated her clients' request that Council allow the grandfathering in of the pole sign partially to save them the expense.

- **Mike Buck, 3155 Edgemont Road, Gubanc's Pub**

Mr. Buck said that Mark Grimm told him that 43 of the 67 businesses with the non-conforming pole signs have requested that the Council stay with its original decision to grandfather in the pole signs. He observed that the Council made the decision in a smaller context and was

now getting feedback from a larger circle that its decision might have been excessive. He mentioned his attempts to work out a compromise with Councilors Lowrey and Chizum prior to the last decision. He concurred with the neighborhood that they needed a sign code. He described Councilor Rohdes comments during the last meeting as a well-thought out rationale.

Mr. Buck discussed the issue of business owners installing a sign approved under the Code, only to have that Code change as aesthetic standards changed. He described his pole sign, one foot over what was allowable under the current sign code, as not unattractive. He argued that there could be ugly pole signs and ugly monument signs.

Mr. Buck asked the City to look at the sign code with consideration for the context of a sign. He cited his pole sign, as necessary for visibility from his driveway; a monument sign would block sightlines as people tried to pull out of the driveway. He spoke to incorporating sufficient flexibility in the code to allow staff some latitude in using their judgment and discretion in applying the code. He pointed out that signs cost between $5,000 to $10,000, not including the electrical and other costs associated with moving them to another location.

- **Darrell Eddy, 2244 SW Advance Road, West Linn, Lake Grove Garden Center owner**

Mr. Eddy noted that he was the second-generation owner of this business; their pole sign has been in place for over 30 years. He said that he has not had six years to replace his sign, as he was unaware of any problem until he received a letter in March telling him that he had one year to replace it. He indicated that going to a monument sign would cost him $10,000 plus because he had to tear up the

parking lot to install the electrical lines to a monument sign. He mentioned that a monument sign would also block the sightlines of vehicles leaving his business. He questioned why a sign that has been up for 30 years was all of a sudden illegal.

Mayor Klammer closed the public hearing

**COUNCIL DISCUSSION**

Councilor McPeak stated that she has reconsidered her earlier decision to grandfather in the pole signs, provided Council opened a review of the sign code following the disposition of this issue. She commented that she understood the grandfathering in pole signs issue coming from a desire to treat businesses fairly while at the same time improving the appearance of Lake Oswego. She spoke to continuing to pursue those two goals but did not think that grandfathering in pole signs was the way to get there.

Councilor Schoen stated that, after considerable thought with respect to his original vote to grandfather in the pole signs, he concluded that Lake Oswego needed consistency within the community. He cited the consistency in signs that he has seen in various communities around the country as adding a great deal to those communities, such as Carmel, California, Cannon Beach, Oregon, and Boulder, Colorado resort areas. He indicated his opposition to grandfathering in the pole signs.

* * *

## APPENDIX M

## PLAINTIFF'S EXHIBIT A

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Of Attorneys for Defendants

**UNITED STATES DISTRICT COURT**

**DISTRICT OF OREGON**

| | |
|---|---|
| **G.K. LTD., TRAVEL,** an Oregon corporation; **W.H. GILLISON;** and **RAMSAY SIGNS, INC.,** an Oregon corporation,<br><br>Plaintiffs,<br><br>v.<br><br>**CITY OF LAKE OSWEGO,** and **SANDY INGALLS,**<br><br>Defendants. | No. CV 02-1147-KI<br><br>**DEFENDANTS' RESPONSE TO PLAINTIFF'S SECOND SET OF INTERROGATORIES** |

Defendants City of Lake Oswego and Sandy Ingalls respond to Plaintiffs' Second Set of Interrogatories as follows:

## GENERAL OBJECTIONS

Defendants object to instructions, definitions, and interrogatories that are inconsistent with Defendants' obligations under FRCP 33.

## SPECIFIC RESPONSES

### INTERROGATORY NO. 1:

Please identify each person of any committee, group, commission, association. or partnership farmed by the City of Lake Oswego, or asked or invited by the City of Lake Oswego to draft, review, revise, change, solicit input, or deliberate over a draft sign code or draft sign code amendments to replace or modify the 1994 sign code, including but not limited to Ordinances #2225 and #2266.

### RESPONSE TO INTERROGATORY NO. 1:

The answer to this interrogatory is derived from the business records of the defendant to and from an examination of those records. The burden of ascertaining the answer is substantially the same for the plaintiffs in this case as it is for the defendants. The answer to this interrogatory may be derived from examination of the documents previously produced on the adoption records for Ordinances Nos. 2225 and 2266. During this period, the documents show that the sign code was reviewed by the planning commission and the development review commission. Notices were sent of proposed changes to the sign code to local business associations within the City, neighborhood associations, persons who testified before the planning commission or city council on earlier sign code changes, and sign companies. The produced documents, for example, show

that notice of the September 5, 2000 public hearing on Ordinance No. 2266 were sent to specific neighborhood association chairs, business associations, chamber of commerce board members, persons who testified in prior council or planning commission hearings, and Lake Grove Business Association members. The produced documents show notice of a joint planning commission/development review commission February 28, 2000 meeting on sign code amendments was sent to a number of persons and organizations, including plaintiff Ramsey Signs. The produced documents show that notice of the February 1, 2002 Council hearing on Ordinance No. 2225 was sent to a number of persons and organizations. Additional names can be derived from the records indexed in the produced document entitled "Clerks Index Report – Legislative History (Detailed)" showing the legislative history documents for Ordinance No. 2310, relating to temporary signs in the public rights of way. In addition, all groups in the community are solicited for comment on proposed legislation through the general notices for council meetings.

**INTERROGATORY NO. 2:**

Please identify the name, title, author, and year of publication of all documents – including but not limited to books, treatises, journals, studies, articles, written opinions, research papers, or ordinances from other jurisdictions – the City of Lake Oswego or its agents considered, reviewed or relied upon in drafting, considering, or deliberating over Ordinances #1921, #2085, #2225, and #2266.

**RESPONSE TO INTERROGATORY NO. 2:**

Defendants do not know the answer to this interrogatory. The ordinance drafting files of the city attorney have not been retained by the City of Lake Oswego. Defendants are unable to identify particular law review articles, cases, other ordinances or other documents reviewed by the city attorney in drafting these ordinances. To whatever extent the produced records of the adoption of these ordinances show written submissions by persons or references to written documents, those submissions and comments were considered by the City Council.

DATED this 8th day of April, 2003.

/s/ Douglas J. Schmitz
Douglas J. Schmitz

STATE OF OREGON )
) ss.
COUNTY OF CLACKAMAS )

The foregoing instrument was acknowledged before me this 9th day of April, 2003, by Douglas J. Schmitz, the City Manager of the City of Lake Oswego, Oregon, on behalf of the City.

[LOGO] OFFICIAL SEAL
JANE MCGARVIN
NOTARY PUBLIC – OREGON
COMMISSION NO. 333882
MY COMMISSION EXPIRES
MAY 28, 2004

/s/ Jane McGarvin
Notary Public for Oregon
My Commission Expires:
May 28, 2004

**APPENDIX N**

**EXHIBIT 5**

S. INGALLS 09-03-03

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

| | |
|---|---|
| G.K. LTD, TRAVEL, an Oregon corporation, WH. GILLISON, KATHLEEN KUSUDO and RAMSAY SIGNS, INC., an Oregon corporation, | ) |
| Plaintiffs, | ) Case No. |
| v. | ) 02-1147-KI |
| CITY OF LAKE OSWEGO, and SANDY INGALLS, | ) |
| Defendants. | ) |

DEPOSITION OF SANDY INGALLS

Taken in behalf of the Plaintiffs

September 3, 2003

* * *

[2] BE IT REMEMBERED THAT, pursuant to Oregon Rules of Civil Procedure, the deposition of SANDY INGALLS was taken before Colleen R. McCarty, Certified Shorthand Reporter in and for the state of Oregon, on Wednesday, September 3, 2003, commencing at the hour of 9:26 a.m., the proceedings being reported in the law offices of Lake Oswego City Hall, 380 A Avenue, Third Floor, Lake Oswego, Oregon.

* * *

APPEARANCES:

RAMIS, CREW, CORRIGAN & BACHRACH, LLP

By Mr. Stephen F. Crew & Mr. T. Chad Plaster

Attorneys for plaintiffs

PRESTON, GATES, ELLIS, LLP

By Mr. Timothy J. Sercombe

Attorney for Defendants

* * *

[42] are there any circumstances that you're aware of when there's been a change in a copy of a sign that that [sic] would result in a sign having to come down because it doesn't qualify any further as a nonconforming use or it's no longer grandfathered?

A. I don't think we have anything grandfathered in this city, so I don't think that grandfather would apply.

Q. Let me skip the grandfathering and let me ask you, are you aware of any circumstances based upon your experience enforcing this code wherein a change of copy in the sign, changing the message or the logo, would result in the city requiring the sign to come down? For example, if it's a – the business has changed hands and they're putting up a new sign for the new business.

A. If the business changed hands?

Q. Yes.

A. That is not a change of copy, that's a change of business. It would have to come down with the change under this. With the change of business under a change of

copy if it is the same business it would not have to come down.

Q. What if it's not the same business?

A. It would need to come down, would need [43] to comply as a new sign.

Q. So if it came – if it was a change in business and they changed the copy on it would the sign have to come down?

A. Wouldn't you?

Q. Pardon?

A. Wouldn't you if it was your business, you would want your new sign up?

Q. No, my question is – I get to ask the questions here.

A. Okay.

Q. If there's been a change in the business and, therefore, the new business wants to change the copy on the sign and they did so?

A. They would have to comply with the code and get a permit.

Q. And if they didn't comply with the code that sign would have to come down?

A. We would ask them to come in and get a permit. The permit would have to be for any sign that complied with code. If that sign did not comply with code they would be asked to put up something different.

Q. But let's assume the sign that they're seeking to change is a nonconforming sign under the [44] code but its allowed to stay until May of 2004, or 5, whatever that date is.

A. 2004.

Q. 2004. Let's assume that it's a nonconforming and it's got to come down in 2004, but before 2004 there's been a change in the ownership and the new owner has changed the copy of the sign, that sign would have to come down?

A. Yes, it would.

MR. SERCOMBE: I object, again – let me just state an objection to the form of the question, Stephen. When you're talking about a sign coming down and stuff, and I don't mean to instruct the witness, but that's – there are lots of situations where signs don't come down but are altered in order to comply with the code.

And I understand this case is about a pole sign, but there's lots of regulations in here that in order to comply with those regulations you don't need to take down the sign –

MR. CREW: Fair enough.

MR. SERCOMBE: – need to change it in some way. So you keep using the word "coming down," that's not technically correct.

MR. CREW: I agree. I'll try and [45] rephrase that.

BY MR. CREW:

Q. Whether or not it has to dome down, the scenario I gave you, the sign would violate the code at that point?

A. If he did not have a permit for his brand-new sign, be it putting in a new piece of plastic or he built a new sign he would need to have a permit for it.

Q. Let's assume its the same sign, but –

A. Same box.

Q. Same box, and they just changed the wording, changed the name.

A. Is it a monument sign? Is it one of our legal signs?

Q. No, it's a pole sign.

A. If it's a pole sign he'd have to come in for a permit for a legal sign.

Q. And if he didn't come in for a permit that would be a violation of the code?

A. Yes. He needs a permit to – in this city to have a sign.

Q. And how would you determine whether or not there was a change in copy and thus triggering the provision of the code that we've been talking [46] about? You'd have to read the sign, wouldn't you?

A. If there's a new sign up there –

Q. Same sign.

A. So we haven't changed the wording, we haven't changed the plastic?

Q. We've changed the wording.

A. We've changed the plastic that the letters are on?

Q. We've changed the wording, doesn't say A, B, C Company anymore, it now says X, Y, Z Company. That's a change in the copy.

A. It's a change of the wording.

Q. Right. So that's a change of copy under he definition of the code, isn't it?

A. He has changed his whole sign. Or the sign, I should say, has changed.

Q. So it's been a change of copy under that definition of the code?

A. If the words have been changed under this definition then – logo or message – if the message or words have changed that would be a change of copy.

Q. Of course, to determine that you would need to read the sign and determine what it says?

A. You can read it or could look at it and [47] see if its a new signage.

Q. But you would have to read it, wouldn't you, to see what it said to determine whether or not its been a change in copy?

A. Uh-huh, yes.

Q. That's a yes.

Now, the city does keep certain records on enforcement of the sign code, as I understand it, like permit files and enforcement materials, and I think you also keep a log on illegal sign retrieval log?

A. Yes.

Q. And the city also, as I understand it, sends out notice of civil infractions for violations of the sign code; is that correct?

A. They do.

Q. Have you ever been involved in that part of it?

A. I believe I've sent out a couple, a few. I couldn't tell you how many. As my predecessors did.

Q. Who had the job immediately before you?

A. Stephanie Fiereck.

MR. CREW: Why don't we, for the record, mark that copy of the sign code she was using

* * *

[50] Q. So that's what you felt – that's why you felt that sign violated the code; is that correct?

A. Yes. And my predecessor in the next paragraph said the same thing.

Q. And I take it to determine whether or not the sign that you're advising them in this letter that violates the code, to determine whether or not that sign violated the code, any section of it, you had to read the code to determine – you had to read the sign to determine what it said?

A. I had to read the code to know that that temporary sign was not allowed because no temporary sign that is allowed in the EC zone.

Q. Well, then you also had to read the sign, though, didn't you, to determine what the sign said?

A. Yes, I read the sign, but I also noted that that particular sign is not allowed.

Q. But your letter says, doesn't it say, that the temporary sign doesn't appear to be for a special sale?

A. Right.

Q. So if it was for a special sale that wouldn't violate the code?

* * *

CERTIFICATE

I, Colleen R. McCarty, Certified Shorthand Reporter, do hereby certify that, SANDY INGALLS appeared before me at the time and place mentioned in the caption herein; that the witness was by me first duly sworn on oath, and examined upon oral interrogatories propounded by counsel; that said examination, together with the testimony of said witness, was taken down by me in stenotype and thereafter reduced to typewriting; and, that the foregoing transcript, Pages 1 to 94, both inclusive, constitutes a full, true, and accurate record of said examination of and testimony given by said witness, and of all other oral proceedings had during the taking of said deposition, and of the whole thereof, to the best of my ability.

Witness my hand at Portland, Oregon, this 9th day of September, 2003.

CERTIFIED SHORTHAND REPORTER
Oregon
CSR
00-0371
COLLEEN McCARTY

/s/ Colleen R. McCarty
Colleen R. McCarty
Certified Shorthand Reporter
CSR No. 00-0371

## APPENDIX O

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Of Attorney for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

| | |
|---|---|
| **G.K. LTD, TRAVEL**, an Oregon corporation, **W.H. GILLISON**, and **RAMSAY SIGNS, INC.**, an Oregon corporation,<br><br>Plaintiffs,<br><br>v.<br><br>**CITY OF LAKE OSWEGO**, and **SANDY INGALLS**,<br><br>Defendants. | No. CV 02-1147-KI<br><br>AFFIDAVIT OF DOUGLAS SCHMITZ IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT |

I, Douglas Schmitz, being duly sworn, do hereby depose and say that:

1. I am the city manager of the City of Lake Oswego, and have been employed in that capacity since March 23, 1992. I am the chief administrative officer of the City, and supervise all of its employees. I have personal knowledge of the facts stated in this affidavit that occurred after my employment as city manager. The documents attached as exhibits to this affidavit are correct copies of documents retained by the City as official records.

2. The Sign Code of the City of Lake Oswego is codified in chapter 47 of the Lake Oswego Code. Portions of this code were adopted in July, 1985 as Lake Oswego Ordinance No. 1921. That ordinance was revised and amended in 1993 through Lake Oswego Ordinance No. 2085. Further amendments were made in February, 2000 (Ordinance No. 2225), September, 2000 (Ordinance No. 2266), May, 2002 (Ordinance No. 2310) and in April 2003 (Ordinance No. 2358). A true copy of Chapter 47 of the Lake Oswego Code is attached as *Exhibit 1*.

3. Ordinance No. 1921 is attached as *Exhibit 2*. According to the July 2, 1985 city council minutes, the ordinance was adopted at the recommendation of the city attorney in order to respond to Oregon judicial opinions on the regulation of speech.

4. In 1994, the City began a process to re-examine the Sign Code and to eliminate any portion of the code that could be unconstitutional. A new sign code was drafted and presented to the planning commission for review. *Exhibit 3* is the February 8, 1993 agenda of the planning commission and memorandum to the commissioners from senior planner Robert Galante. As noted in the staff memorandum, a public workshop on the draft sign code was held on January 11, 1993. The staff memorandum

reports that the draft code was reviewed by the East End Development Committee on January 7, 1993, and by the Lake Oswego Chamber of Commerce on January 20, 1993. The staff memorandum states that the intent of the revision was to eliminate the content based regulation found in the old code and to regulate signs by zone, height, illumination and number. The memorandum notes that another purpose of the revision was to "encourage the transition from pole signs to monument signs in a number of zones. Many business owners have approached the City requesting monument signs to replace pole signs which become less visible as street trees grow taller." The planning commission conducted a public hearing on the draft sign code on February 8, 1993.

5. The commission deliberated on the draft sign code at its March 8, 1993 and April 12, 1993 meetings, directing a number of changes to the draft. On May 10, 1993, the commission conducted another public hearing, directed changes to the draft sign code, and forwarded its recommended draft to the city council. Under section 47.135(4)(A) of the proposed draft pole signs were prohibited in the commercial zoning districts. The minutes of the May 10, 1993 hearing are attached as *Exhibit 4.*

6. The planning commission recommendation was forwarded to the city council through a June 18, 1993 staff memorandum and attachments, attached as *Exhibit 5.* A true copy of the June 18, 1993 council meeting minutes is attached as *Exhibit 6.* These minutes accurately reflect the discussion and deliberations at that meeting. The minutes reflect that the new code "was principally designed to eliminate the content base language of the current code" and that it "encouraged a transition from pole signs to monument signs." The council received advice from the

city attorney that "amortization schemes (allowing phasing in of new regulations) have been held by the courts not to be a taking because of the depreciation of the signs over time anyway" and that "the Oregon Supreme Court had broadly construed the free speech amendment and was more protective of individual free speech rights than the US Constitution. He commented that, in Oregon, commercial speech could not be treated any differently that any other type of speech, and thus content could not be regulated." There were suggested changes at the June 18 meeting to further eliminate content based regulations of speech. The councilors noted that "size and aesthetics were issues of concern."

7. On October 5, 1993, the city council conducted a public hearing on the proposed sign code. The council received a September 27, 1993 staff report, containing the latest revision of the draft sign code, attached as *Exhibit 7* (without exhibits 2-14). The minutes of the October 5, 1993 city council meeting and hearing is attached as *Exhibit 8*. These minutes accurately reflect the discussion and deliberations at that meeting. Representatives of the Oregon Electric Sign Association testified. Other testimony was presented that sign codes were necessary to prevent visual degradation in cities, and that implementation of restrictive sign codes benefited businesses rather than hurt them through the creation of a more pleasant visual atmosphere for the shopper. The council voted to approve the draft sign code.

8. The council considered adoption of the sign code at its December 7, 1993 meeting. *Exhibit 9* is the relevant portion of the minutes of that meeting. These minutes accurately reflect the discussion and deliberations at that meeting. The council voted to give first reading to the

ordinance adopting the sign code at its December 21, 1993 meeting, the relevant part of the minutes of which are attached as *Exhibit 10.* These minutes accurately reflect the discussion and deliberations at that meeting. The city council adopted findings, conclusions and an order supporting adoption of the draft sign code in Order DA 4-92-1041, attached as *Exhibit 11.* Ordinance No. 2085, adopting the revised sign code, was adopted at the January 4, 1994 city council meeting. A copy of a portion of the minutes of that meeting is attached as *Exhibit 12* and Ordinance No. 2085 is adopted as *Exhibit 13.* These minutes accurately reflect the discussion and deliberations at that meeting. Under the adopted LOC 47.10.410(1)(D), in the commercial zoning districts, "[p]ole signs shall only be allowed when necessary to provide vision clearance at driveways or intersections and when there is no alternative, visible on-building or monument sign location." Under the adopted LOC 47.04.100(1) nonconforming signs could undergo a change of copy "with the exception that any change for a new business or use or any changes in a wall sign which is painted on a structure will comply with this chapter at such time as change it copy of alteration occurs." The new code provided that "[a]ll nonconforming signs shall be altered to conform to the requirements of this chapter within five years of the effective date of this sign code." The effective date was February 3, 1994 and the five-year amortization date was February 3, 1999.

9. On December 10, 1998, I adopted the Temporary Sign Collection and Retrieval Policy which is attached as *Exhibit 14.*

10. In 1997, the City Council adopted design standards for development in the downtown area (the "EC" zone). These standards required nonconforming signs to be

changed by May 21, 2004. The City completed an inventory of signs in 1998, documenting the conforming, nonconforming and lawful status of all signs within the city. Because this inventory was not done in time to reasonably warn property owners of the amortization period expiration for nonconforming signs under Ordinance No. 2085, the staff recommended extension of the amortization period. *Exhibit 15* is a copy of the August 27, 1999 staff report making this recommendation, as well as other recommended changes to the sign code (combining the signage restrictions for the downtown area into the sign code, codifying policies in effect regarding the sign code).

11. *Exhibit 16* is a copy of the minutes of the September 14, 1999 city council meeting where the council considered the staff recommendations in the August 27, 1999 staff report. These minutes accurately reflect the discussion and deliberations at that meeting. There was debate about the wisdom of extending the amortization period for nonconforming signs, with the city attorney advising that "this question [was] a practical policy circumstance, not a legal issue." There was discussion about different signage allowance along Booms Ferry or Kruse Way Roads "because of their auto-orientation" but with a preference for leaving the code the way it was. The council discussed the "subjective review provision" within the code. The council president supported removal of this section. The staff was directed to return with more information.

12. The staff drafted proposed Ordinance No. 2225 and forwarded the draft to the planning commission for review. The commission held a public hearing on the draft on November 8, 1999. At the public hearing, Tom Keljo, president of the Oregon Electric Sign Association testified that a 32 square foot sign mounted on the wall of a building

"was a size that drivers could read safely while driving." The commission heard a report from staff on the sign code design standards, and a response to the council's concerts that LOC 47.06.200(4) "could be interpreted in a manner that would deny an applicant an effective sign for their business." The staff reported that there had only been one appeal of a denial of a sign permit application in the previous 14 years (the sign for the Chevron station along Boones Ferry Road). The applicant was granted relief by the Development Review Commission and the Council on appeal. The staff reported that "it typically took three to ten days to approve a sign application and there had never been a case where the permit had not been issued because the staff and the applicant had not been able to achieve resolution of the compatibility issue." These representations of the staff are correct. The staff opposed "cookie cutter" objective regulation of design. Attached as *Exhibit 17* is a copy of a January 10, 2000 staff report to the city council on proposed Ordinance No. 2225, containing a copy of the November 8, 1999 planning commission minutes.

13. The January 10, 2000 staff report and requested sign code changes were presented to the city council at its February 1, 2000 meeting. Ordinance No. 2225 was adopted by the council at its February 1, 2000 meeting. *Exhibit 18* is a copy of portions of the minutes of that meeting. These minutes accurately reflect the discussion and deliberations at that meeting. *Exhibit 19* is a copy of Ordinance No. 2225. The council discussed the mayor's proposal to form a committee to study the sign code. The staff noted that there were only seven variance applications to the requirements of the sign code in the previous ten years, and that all of the variances were granted. The council directed the planning commission and development review

commission to jointly review the sign code and assess its effects on businesses.

14. The development review commission and planning commission conducted a public hearing on the sign code, after notices were mailed to all local business associations within the city, neighborhood associations, persons who testified in earlier sign code hearings and all sign companies that received a sign permit since 1998. Notice of this hearing was provided to plaintiff Ramsey Signs. The staff report for the meeting (with only the January 18, 2000 council report exhibit) is attached as *Exhibit 20.* The hearing occurred on February 28, 2000 and a copy of the minutes of the meeting of the commissions is attached as *Exhibit 21.* The commissions adopted a motion to recommend no change to the sign code except for two editing changes. Ramsey Sign did not participate in the hearing.

15. The city council continued discussing the efficacy of the sign code throughout 2000. At its May 2, 2000 council meeting, the mayor suggested "grandfathering" in the existing pole signs that were nonconforming uses, or extending the data of compliance. The council debated whether to exempt existing pole signs from the regulation, or to extend the time of compliance. At that meeting, the council approved a motion to allow existing pole signs to continue as nonconforming uses until a change in wording or a change in the business. *Exhibit 22* is a copy of a portion of the minutes of the May 2, 2000 council meeting. The issue came up again at the May 16, June 6, and June 20, 2000 council meetings. Excerpts from the minutes of those meetings are attached as *Exhibits 23, 24 and 25.* These minutes (Exhibits 22, 23, 24 and 25) accurately reflect the discussion and deliberations at those meeting.

16. The council conducted a public hearing on the regulation of pole signs on July 18, 2000. Attached as *Exhibit 26* is an excerpt of the minutes of the council meeting for July 18, 2000. These minutes accurately reflect the discussion and deliberations at that meeting. At the hearing, there was testimony on the aesthetic impacts of pole signs along Boones Ferry Road. The council debated the issue of grandfathering in the existing pole signs and the importance of improving the appearance of the city as a way of improving the city's aesthetics and business climate. The council voted to extend the compliance deadline for pole signs until May, 2004. The council separately adopted a motion to "direct staff to review the sign code for ways in which it could be improved, specifically including the idea of a business/city partnership to replace monument and pole signs along Boones Ferry Road with a uniformly designed monument sign."

17. On September 5, 2000, the city council held a public hearing and considered the adoption of Ordinance No. 2266, which extended the date of compliance for nonconforming signs to May 21, 2004. A copy of the relevant portion of the council meeting minutes is attached as *Exhibit 27* and a copy of Ordinance No. 2266 is attached as *Exhibit 28*. These minutes accurately reflect the discussion and deliberations at that meeting.

18. City Councilor Ellie McPeak held a meeting with business owners in the Lake Grove Business District (including the businesses along Boones Ferry Road) to discuss implementation of the sign code. *Exhibit 29* is an official record of the identities of the attendees at that meeting, and shows attendance by Olf Keller of Journeys, the predecessor in interest to plaintiff GK LTD. Following this meeting, Councilor McPeak reported to the council on

the results of the conference at the October 10, 2000 council meeting. *Exhibit 30* is a copy of the relevant portion of the minutes of that council meeting. These minutes accurately reflect the discussion and deliberations at that meeting.

19. The City of Lake Oswego does not discriminate in the enforcement or application of its sign code because of the race or ethnic background of interested parties. Nor does it use particular parts of the sign code to censor messages on signs or prevent the communication of particular messages on signs.

20. Instead, the City Council has sought to adopt a sign code that is constitutional in all respects. Making the sign code constitutional was the major motivation for its revision in 1993 and 1994. The business community was involved in that revision. The sign code was reviewed again in 1999 and 2000, with considerable input from the business community on the pole sign issue and compatibility review.

21. The City does not have a record of the issuance of a sign permit for the pole sign at issue. There is no record of a sign permit. The City maintains permanent sign permit logs that note the identity of the business and address for permits for permanent signs. There is no entry between 1980 and 1999 for a sign at 15835 SW Boones Ferry Road, or for the businesses Keller & Pinnell Travel, Apollo Travel or Journeys! of Lake Oswego. None of the permits for Ramsey signs are for the disputed pole sign. It is more likely than not that no sign permit was ever obtained for the pole sign at issue in this case.

22. The City lacks the resources to continuously monitor compliance with its sign code by property inspections.

Consequently, much of the sign code enforcement occurs because of citizen complaints. The City may enforce the sign code in one instance, but not in another comparable situation, because the former situation is called to our attention. That was the case here. The enforcement proceedings against GK LTD and its pole sign began with a complaint registered with the City after the change of copy and business change. (The complaint was made to me and passed it on to my subordinates for investigation and potential enforcement actions. These actions preceded the communications from Sandy Ingalls to the plaintiffs about the pole sign code violation. DATED this ___ day of September, 2003.

By /s/ Douglas Schmitz
Douglas Schmitz

STATE OF OREGON )
) ss
County of Multnomah )

Subscribed to and sworn before me this 15th day of September, 2003.

/s/ Barbara O. Parr
Notary Public for Oregon

[SEAL]
OFFICIAL SEAL
**BARBARA O. PARR**
NOTARY PUBLIC-OREGON
COMMISSION NO. 344067
MY COMMISSION EXPIRES APRIL 20, 2005

**APPENDIX P**

PLAINTIFF'S EXHIBIT B

D. SCHMITZ 09-05-03

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

| | | |
|---|---|---|
| G.K. LTD, TRAVEL, an Oregon corporation, WH. GILLISON, KATHLEEN KUSUDO and RAMSAY SIGNS, INC., an Oregon corporation, | ) | Case No. 02-1147-KI |
| Plaintiffs, | ) | |
| v. | ) | |
| CITY OF LAKE OSWEGO, and SANDY INGALLS, | ) | |
| Defendants. | ) | |

DEPOSITION OF DOUGLAS SCHMITZ

Taken in behalf of the Plaintiffs

September 5, 2003

* * *

[26] section 47.06.200, and the heading is "Construction and Design Standards for Permanent Signs."

You're welcome to read the whole section, but my question is going to focus on paragraphs and of that particular Section of the code.

Have you had a chance to read sections 4 and 5?

A. Yes.

Q. Section 4 reads, "Sign shall be designed to be compatible with other nearby signs, other elements of street and site furniture, and with adjacent structures. Compatibility shall be determined whether relationship of the elements of form, proportion, scale, color, materials, surface treatment, overall sign size, and size and style of lettering."

I take it that is the criteria that is applied to applications for permanent signs?

A. Yes.

Q. And in reading, paragraph 4 it struck me that reasonable minds might differ on whether or not something is compatible as determined by the relationships, of the elements of form, proportion, scale, color, materials, surface treatment, [27] et cetera. Would you agree with me?

A. On some of those elements there could be disagreement.

Q. What kind of training do you give to the folks in planning to determine whether or not they're applying this criteria correctly? In other words, do they have any training in graphics or art or, specifically, any instructions on this particular criteria which I call the compatibility criteria?

A. Well, the planners that we hire have to have as part of their consideration for employment degrees in urban planning, architecture. So assuming they get some of that training at their academic institutions.

Q. Back to the criteria there, talks about the relationship of form, proportion, scale, color, material, surface

treatment, overall sign size, et cetera. Can you tell me what that means?

A. Yes.

Q. Okay. Would you, please?

A. When you look at a sign you look at how it fits with its surroundings, what the material is, the form that it's going to take, the location where it's going to be sited. And all of those are [28] components that go into making decisions whether or not it meets the code requirements and the streetscape on which it is to be placed.

Q. And it says – also refers to street and site furniture. What is that?

A. Street furniture are those amenities on the streetscape, such as light poles, benches, trash cans, bike racks, landscaping.

Q. Well, what if one person thinks it is compatible based upon all those elements, whereas somebody else doesn't?

A. Then I go back to your question, there could be disagreement.

Q. And then if you look at paragraph 5, says, "copies on signs visible from streets shall be designed to reduce distractions to motorists. Signs may be reviewed for clarity and readability."

When it says, "signs may be reviewed for clarity," does that mean that its clear to the eye or does it mean clarity to the reader who's trying to understand it, or both?

A. Could be both.

Q. If you could also turn to page 47-2, and specifically the purpose section of the code. If you could just take a minute and read 47030 – [29] excuse me, 4703010.

A. Okay.

Q. I take it the purpose provision of the code, that is also something that is applied or is criteria that staff uses to determine whether or not they're going to grant a permit for a sign?

A. I would say not usually.

Q. Does it happen on occasion?

A. Not that I know of.

(Exhibit 16 marked.)

(Discussion off the record.)

BY MR. CREW:

Q. Mr. Schmitz, I think this is a notice of civil infraction. If you look at page 2 of the document it appears that – were you the complainant in this particular case?

A. Says so.

Q. Do you have any recollection of this particular instance?

A. No.

Q. Do you have any reason to doubt the accuracy of this record indicating that you were the complainant?

A. No.

Q. And looking at page 2 – actually,

* * *

[55] to look at the context.

A. I'll have to order you copies, it will take awhile.

Q. I can come here and look and peruse them and tab the ones I want copies of, if that's okay?

A. Okay.

Q. That's all I have. Thank you.

A. Thank you.

MR. SERCOMBE: I have nothing.

(The deposition concluded 11:10 a.m.)

(N.B.: As a matter of firm policy, the stenographic notes and computerized backup of this transcript will be destroyed five years from the date appearing on the following certificate, unless notice is received otherwise from any party or counsel thereto on or before said date of the 9th day of September, 2008.)

* * *

(3)

Nos. 05-1603

Supreme Court, U.S.
FILED
JUL 14 2006
OFFICE OF THE CLERK

# In The
# Supreme Court of the United States

G.K. LTD. TRAVEL, W. H. GILLISON, KATHLEEN KUSUDO and RAMSAY SIGNS, INC.,

*Petitioners,*

v.

CITY OF LAKE OSWEGO and SANDY INGALLS,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether Petitioners present compelling reasons to grant the Petition when some of the issues presented to the Supreme Court were not pleaded to the district court or were not preserved for decision.

2. Whether the Petition should be denied because Petitioners do not accurately state the record of the case.

3. Whether Petitioners present compelling reasons to grant the Petition where there is no split of authority among the circuit courts of appeal on the relevant legal tests applied in the decision under review.

4. Whether the Petitioners present compelling reasons to grant the Petition when the case under review does not conflict with a decision of this Court or decide an important issue of federal law that has not been settled by this Court.

TABLE OF CONTENTS


| | Page |
|---|---|
| SUMMARY OF REASONS TO DENY THE PETITION | 1 |
| STATEMENT OF THE CASE | 3 |
| I. Introduction | 3 |
| II. Nature of the Asserted Claims | 3 |
| III. Disposition of Claims in the Proceedings Below | 5 |
| IV. Petitioners Distort the Facts | 8 |
| REASONS FOR DENYING THE PETITION | 11 |
| I. There is No Split of Opinions within the Ninth Circuit or Among the Circuit Courts on the Questions Presented | 11 |
| II. The Circuit Court Decision Was Correct | 14 |
| A. The Court of Appeals Did Not Create a "De Minimis" Exception to the First Amendment | 14 |
| B. The Limitation on Pole Signs Advances Substantial Governmental Interests | 16 |
| C. An Administrative Permitting Process is Appropriate | 19 |
| D. The Design Review Criteria Are Not Unconstitutionally Vague | 20 |
| E. There Are No Jury Questions | 21 |
| F. Conclusions | 23 |
| CONCLUSION | 24 |

# TABLE OF AUTHORITIES

Page

CASES

*Ackerley Communications of the Northwest v. Krochalis*, 108 F.3d 1095 (9th Cir. 1997) ..... 13

*Brazos Valley Coal. for Life, Inc. v. City of Bryan, Texas*, 421 F.3d 314 (5th Cir. 2005) ..... 12

*City of Ladue v. Gilleo*, 512 U.S. 43, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994) ..... 11, 17

*Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984) ..... 18

*Don's Porta Signs, Inc. v. City of Clearwater*, 829 F.2d 1051 (11th Cir. 1987) ..... 13

*Edenfield v. Fane*, 507 U.S. 761, 113 S. Ct. 1729, 123 L. Ed. 2d 543 (1993) ..... 18

*Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995) ..... 12

*Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965) ..... 13, 19

*G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.2d 1064 (9th Cir. 2006) ..... *passim*

*G.K. Ltd. Travel v. City of Lake Oswego*, 2004 WL 817142 (D. Or. 2004) ..... 5, 7

*Granite State Outdoor v. City of St. Petersburg*, 348 F.3d 1278 (11th Cir. 2004) ..... 13

*Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) ..... 20

*Harnish v. Manatee County*, 783 F.2d 1535 (11th Cir. 1986) ..... 12

TABLE OF AUTHORITIES – Continued

Page

*Hill v. Colorado*, 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000) ..... 12, 15

*Lindsay v. City of San Antonio*, 821 F.2d 1103 (5th Cir. 1987) ..... 12, 13

*Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001) ..... 12, 17

*Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984) ..... 12

*Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981) ..... 13, 17

*Nat'l Adver. v. City of Orange*, 861 F.2d 246 (9th Cir. 1988) ..... 16

*Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983) ..... 19

*Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814 (6th Cir. 2005) ..... 12

*Southern Oregon Barter Fair v. Jackson County, Oregon*, 372 F.3d 1128 (9th Cir. 2004) ..... 13

*Thomas v. Chicago Park District*, 534 U.S. 316, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2002) ..... 13, 19, 20

*Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994) ..... 11, 14, 15

*Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248 (10th Cir. 2004) ..... 13

*Ward v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) ..... 7, 16, 17, 20

TABLE OF AUTHORITIES – Continued

Page

RULES

Lake Oswego Code 47.03.005-47.12.500 ..... 3

Lake Oswego Code 47.03.010 ..... 18, 22

Lake Oswego Code 47.04.105 ..... 19

Lake Oswego Code 47.06.200(4) ..... 20

Supreme Court Rule 10(a) ..... 13

Supreme Court Rule 10(c) ..... 23

## SUMMARY OF REASONS TO DENY THE PETITION

1. Petitioners seek review on issues that were not presented or preserved before the district court. Petitioners did not plead that the City censored speech in the way that it reviewed sign permit applications, or that the City's purpose was to suppress speech. Petitioners ultimately sought a jury trial only on its claims about the application of the pole sign limitation. They cannot now complain about the loss of a jury trial for other claims. Petitioners did not contest Respondents' arguments on various claims for relief in the summary judgment proceedings, and cannot revive that contest in the Supreme Court. Thus, some of the issues presented for review would not be properly before the Court if certiorari were granted.

2. The Petition does not present the issues accurately or with clarity. Petitioners contend that the sign code's limitation on pole signs and the required review of signs' appearance was not shown to advance community aesthetics and traffic safety goals. But Petitioners misstate the legislative history and record of the hearings on those requirements. Petitioners state facts that are not supported by the record of the case and are simply not true. Sorting fact from fiction, and truth from exaggeration, is not an efficient use of this Court's time.

3. There is no split of authority among the circuit courts of appeal on the legal tests used to assess the constitutionality of sign codes. The decision under review correctly states those tests. Petitioners disagree with the application of settled law to their claims. Petitioners' dissatisfaction is not a compelling reason to grant review.

4. The text of the sign code at issue is unique to the City of Lake Oswego. A Supreme Court determination about the wording of Lake Oswego's code would be of value only to the litigants. That value is not a compelling reason to grant the Petition. In any event, the decision of the court of appeals is correct. Lake Oswego's restrictions on sign structures and review of the appearance of signs apply without regard to the message on a sign and do not need to be justified by a compelling interest. There was a sufficient basis for the City's conclusion that the challenged parts of the law advance its interests in community aesthetics and traffic safety. Supreme Court precedent does not impose greater procedural requirements for the permitting decisions here because the regulated signs are posted on private land. The sign permit standards are precise enough to provide guidance to applicants, control official discretion, and allow meaningful judicial review. There are no issues of fact that preclude entry of summary judgment on the legal sufficiency of those standards.

## STATEMENT OF THE CASE

### I. Introduction.

Petitioners present a different case to this Court than the one before the courts below. Petitioners claim that jury issues exist as to the design review provisions of the sign code. Yet, Petitioners did not seek damages or a jury trial on those parts of the sign code. Petitioners seek review because they claim that the ordinance is vague and violates constitutional standards for regulations of the time, place and manner of speech conduct. Yet, Petitioners failed to contest Respondents' summary judgment motion on those claims. Petitioners assert that issues of fact precluded summary judgment on claims about the pole sign limitation. Yet, Petitioners sought summary judgment on those same claims.

### II. Nature of the Asserted Claims.

Petitioners misstate the nature of their original claims. The preserved issues on appeal are narrower than stated in the Petition. Petitioners initially attacked the legal sufficiency of dozens of provisions in the sign code, Lake Oswego Code (LOC) 47.03.005-47.12.500; E-1 to E-46.[1] In their arguments on appeal, however, Petitioners focus upon the parts of the code that preclude pole signs in most instances and require substitution of a monument or wall sign for Petitioners' existing pole sign and the provision that sets out design standards for signs. Petitioners

[1] "ER" refers to the excerpt of record filed with the circuit court. The letter references are to appendices to the petition for writ of certiorari.

did not plead or preserve the asserted issues on the design standards provision.

The amended complaint pleaded 17 claims for relief. ER 411 to 433; F-1 to F-32. Petitioner sought damages and a jury trial on four "as applied" claims: the first claim for relief (application of regulations to prohibit commercial speech on petitioners' pole sign); fourth claim for relief (application of regulations to ban pole sign as a protected medium of speech); fifth claim for relief (racial discrimination in enforcement of sign code); and, the sixth claim for relief (just compensation for removal of the pole sign).

The second and third claims for relief sought declaratory and injunctive relief because of the alleged unconstitutional application of the City's pole sign regulations to Petitioners. In the remaining 11 claims for relief, Petitioners sought declaratory and injunctive relief on the text of the sign code. They pleaded that various parts of the sign code were "facially unconstitutional" because the text of the ordinance purportedly regulated on the basis of sign content or speaker viewpoint, imposed unreasonable limitations on signs, preferred commercial speech, contained insufficient procedural safeguards, granted too broad of discretion to decision makers, improperly classified, and were overbroad and vague. *Id.*

Petitioners withdrew the fifth claim for relief (race discrimination), the sixth claim for relief (just compensation for taking) and the seventh claim for relief (improper amortization of signs). ER 223 to 246 (submitted pretrial order).[2] Thus, the only pleaded jury claims pertained to the

[2] After a change of counsel, Petitioners later disputed that they authorized the lodged pretrial order. Petitioners separately asked that

(Continued on following page)

application of the City's restrictions on pole signs. The remaining claims, including the claims based on the design review provisions of the ordinance, sought judicial relief based solely upon the text of the ordinance.

Put another way, Petitioners did not plead that the constitutional difficulty with the design review provisions of the ordinance arose because of the manner of their application or because the City harbored an intent to censor or restrict speech, issues that they now assert require jury resolution. Rather, the fourteenth claim for relief was based solely on the text of this part of the ordinance. It asserted that a First Amendment violation existed because of a "facially unconstitutional grant of overly broad discretion," that "sections of the Sign Code place unbridled discretion in the hands of government officials." ER 429 to 430; F-26 to F-27.

Petitioners' theory on appeal and before this Court – that jury issues exist on the constitutionality of the design review provision – differs from the way the claims were pleaded and prosecuted in the summary judgment proceedings. The issues raised in Petitioners' fifth reason for review were not preserved.

## III. Disposition of Claims in the Proceedings Below.

Petitioners' failure to contest particular summary judgment motions made by the City precludes some of the

---

the race discrimination claim be dismissed. The takings claims, the sixth and seventh claims for relief, were found to be premature by the district court and those rulings were not appealed. *G.K. Ltd. Travel v. City of Lake Oswego*, 2004 WL 817142 (D. Or. 2004), Opinion, pp. 26-28; ER 367 to 369; B-30 to B-32.

assertions made to this Court. After withdrawing the fifth, sixth and seventh claims for relief, Petitioners sought summary judgment on 11 of the 14 remaining claims, representing that no material issues of fact prevented entry of judgment. ER 459 to 461. In particular, Petitioners sought summary judgment on the two surviving damage claims, the first and fourth claims for relief, relating to the application of the pole sign limitation. Petitioners only assert that their claims present jury questions after having lost their motions below. Petitioners also sought summary adjudication on the thirteenth claim for relief (insufficient procedural safeguards) and the fourteenth claim for relief (unbridled discretion) relating to the design review provisions.

Respondents sought summary judgment on all of the claims. ER 462 to 465 (defendants' motion for summary judgment). Respondents presented legal arguments on the eleventh claim for relief (facially unreasonable time, place or manner regulations) (ER 492 to 493), and the sixteenth and seventeenth claims for relief (overbreadth and vagueness) (ER 494 to 500). Petitioners did not respond to those arguments. ER 600 to 608.

The district court granted summary judgment to Respondents on these three claims for relief because of Petitioners' failure to respond to Respondents' legal assertions. With respect to the eleventh claim for relief, Judge King held that,

> Based on how plaintiffs pleaded their eleventh claim, defendants address Sections 47.12.500 and 47.04.115 in their memorandum in support of their motion for summary judgment and explain why they meet constitutional standards or argue that such standards are inapplicable.

> Plaintiffs, however, never refute those arguments. This fact, combined with my earlier review of the constitutionality of these content-neutral provisions, lead me to grant summary judgment in defendants' favor on plaintiffs' eleventh claim for relief.

*G.K. Ltd. Travel v. City of Lake Oswego,* 2004 WL 817142 (D. Or. 2004), Opinion, p. 24; ER 365; B-27.

The vagueness and overbreadth claims were similarly dispatched. The court determined that,

> . . . Defendants move against [the 16th and 17th claims for relief] and take pains to address the numerous enumerated sections of the Sign Code that plaintiffs allege are unconstitutionally vague.
>
> Again, plaintiffs do not respond to defendants' arguments. . . . Summary judgment is granted against plaintiffs' sixteenth and seventeenth claims for relief.

*Id.*, Opinion, p. 24; ER 365; B-28.

Petitioners' claim that certain portions of the sign code violate the constitutional standards for time, place and manner restrictions on speech (reason for review two) or are unconstitutionally vague (reason for review four) were abandoned in the district court proceedings and were not preserved.[3] Moreover, to whatever extent Petitioners

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[3] The application of *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (stating the constitutional tests for a speech regulation not based on the content of the speech) to the pole sign limitation was raised and preserved in the proceedings below.

assert that jury questions exist on the first and fourth claims for relief (reason for review five), those contentions are inconsistent with their own motion for summary adjudication, and representations that no material issue of fact exists on those claims.

## IV. Petitioners Distort the Facts.

The Petition should be denied because it distorts the facts and makes assertions not supported in the record. Petitioners claim that the sign code was adopted and reconsidered without "any research" or review of "any studies" on whether the regulations would advance the stated purposes in the ordinance. Petition, p. 2. According to Petitioners, the testimony of citizens "was ignored." Petition, p. 22. What resulted, under Petitioners' version of the facts, was a sign code that contains "regulations of on-premises signs" (Petition, p. 5), a code that regulates signs on the basis of the content of the message on the sign or the viewpoint of the speaker, and one that has permitted the City to "impose subjective conditions for approval of the . . . message and copy" of signs (Petition, p. 4). These assertions are false.

In truth, the sign code was adopted with substantial citizen involvement in its initial adoption in 1985, in its revision in 1994 as well as in reconsideration of the pole sign limitations and design review process in 1999, 2000 and 2004. The business community was substantially involved in the 1985 enactment. ER 190, 196. The 1985 enactment was intended to remove all content-based distinctions in the code, although it was not entirely successful in this effort. ER 170.

The 1994 changes were based, in part, on the City's comprehensive land use plan and its policies on community aesthetics. ER 526. The 1994 changes were intended to further remove subject matter distinctions from its classifications, making the code consistent with evolving state and federal free speech constitutional protections. ER 526 to 527, 529 to 530, 534 to 537, 538. The 1994 revision resulted from two workshops and three public hearings before the planning commission (ER 529), review and suggested changes by a number of business groups (ER 529 to 530), and city council study sessions and hearings (ER 534 to 539). There was a factual record on signs around the community and the country, visual clutter, signage in the rights of way, time restrictions on temporary signs, the need for "fair competition" in signage, sign size and aesthetic concerns, among other issues. *Id.* There was significant testimony on community aesthetics and business needs. ER 187 to 191.

The needs for the pole sign limitation and design review provisions were revisited by the planning commission and city council in 1999 and 2000 hearings and work sessions. ER 173, 547 to 585. In the spring of 2000, the planning commission and development review commission held a joint hearing on whether the pole sign limitation and design review provisions should be changed. Despite notice of the hearing to over 50 sign companies and a number of business groups, only one person testified. The commissions recommended that no change be made. ER 574 to 578. Further hearings were held by the city council in July, 2000. ER 583 to 587. The time for complying with the pole sign restrictions was extended to 2004. A deputized councilor met with business representatives (including Petitioner G.K. Travel's predecessor) to see if

standardizing sign requirements was preferable over design review. There was only "lukewarm support" for the idea and it was not pursued. ER 588 to 589.

Respondents belabor this history to refute Petitioners' factual contentions that the limitations were based on whim and lacked record support. In this case the limitation on pole signs and imposition of design review controls on the appearance of signs resulted from community plans, citizen testimony and professional advice, and those controls were recalibrated and assessed a number of times after their enactment.

In truth, the City's sign code does not regulate on the basis of whether a sign is "on-premises" (i.e., whether its message pertains to a proximate business or activity) or "off-premises." Petitioners' repeated references to the regulation of "on-premises signs" are without foundation. Petition, pp. 5, 6, 10, and 18.

In truth, the sign code does not classify signs on the basis of their message (with the few exceptions found by the district court). The circuit court and the district court found that the code otherwise did not regulate the content or perspective of a sign message. The circuit court did not excuse a content based regulation because it was "di minimus (sic)." Petition, p. 8. The words "de minimis" are not in the opinion. Instead, the court found that there were no regulations of the substantive content of sign copy.

Finally, in truth, the City does not impose conditions on sign permits requiring approval of the content or message of the sign. In fact, Petitioners requested and reviewed all of the City's sign permits, temporary sign permits, permit applications, citations and municipal court and administrative proceedings on sign code enforcement

between 1990 and 2003. ER 442 to 458. Petitioners failed to uncover any censorship or attempts by the City to use the sign code to prevent any subject matter of speech.

## REASONS FOR DENYING THE PETITION

### I. There is No Split of Opinions within the Ninth Circuit or Among the Circuit Courts on the Questions Presented.

The law that applies to the issues stated in the Petition is settled. There is no reason to grant review in order to resolve conflicting cases within the Ninth Circuit Court of Appeals or among the other Circuit Courts of Appeals. Petitioners do not point to any difference of opinion within the Ninth Circuit or among the Circuit Courts of Appeals as to the legal tests applicable to Petitioners' assertion.

Contrary to Petitioners' assertion, the opinion under review does not announce "new changes in standards for regulating on-premises signs" (Petition, p. 6). The opinion applies *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 643, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994) which identified content or viewpoint-based sign regulations as those that regulate the message of a sign (as opposed to policies affecting the sign structure, its physical dimensions or its placement in different zoning districts).

As this Court noted in *City of Ladue v. Gilleo*, 512 U.S. 43, 48, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994), "[i]t is common ground that governments may regulate the physical characteristics of signs. . . ." Review is not needed to assess whether the City of Lake Oswego can regulate the type of structures supporting a sign, precluding taller, pole signs in favor of monument, ground-mounted signs or

wall signs – or to ask whether the City can regulate the appearance of signs. There are numerous decisions upholding regulations on the physical characteristics or location of signs. *See, e.g., Members of the City Council v. Taxpayers for Vincent,* 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984) (ban on attaching signs to public property); *Brazos Valley Coal. for Life, Inc. v. City of Bryan, Texas,* 421 F.3d 314 (5th Cir. 2005) (restrictions on signs in rights-of-way); *Prime Media, Inc. v. City of Brentwood,* 398 F.3d 814 (6th Cir. 2005) (size and height restrictions); *Lindsay v. City of San Antonio,* 821 F.2d 1103 (5th Cir. 1987) (ban on portable signs); *Harnish v. Manatee County,* 783 F.2d 1535 (11th Cir. 1986) (ban on portable signs and changeable-copy temporary signs).

Likewise, it is plain that content-neutral sign regulations are not subject to strict scrutiny review simply because the sign must be viewed to apply the law (e.g., regulations on the appearance or illumination of signs). This Court held in *Hill v. Colorado,* 530 U.S. 703, 721, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000) that it can be proper "to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." The decision under review applied that holding to conclude that regulation of the appearance of signs is not a content-based regulation of speech. Petitioners cite no authority to the contrary.

Federal cases consistently hold that regulations of speech can be justified by "history, consensus and 'simple common sense,'" the test articulated in *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 555, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001) and *Florida Bar v. Went For It, Inc.,* 515 U.S. 618, 628, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995), and applied by the Court of Appeals in the case at

bar. Moreover, with respect to signs, deference is given to the legislative judgment that the regulation of the appearance or location of signs advances community interests in aesthetics and traffic safety. *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 509-510, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981) (plurality opinion); *Ackerley Communications of the Northwest v. Krochalis,* 108 F.3d 1095, 1098 (9th Cir. 1997); *Lindsay,* 821 F.2d 1103; *Don's Porta Signs, Inc. v. City of Clearwater,* 829 F.2d 1051, 1053 (11th Cir. 1987). Petitioners cite nothing to the contrary and review is not warranted to corroborate this principle of law.

Finally, the circuit courts uniformly apply *Thomas v. Chicago Park District,* 534 U.S. 316, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2002) more broadly than Petitioners desire. *Thomas* relaxed the procedural requirements for a prior restraint of speech set out in *Freedman v. Maryland,* 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965) for content-neutral speech regulations. Petitioners wish to narrow *Thomas* to require the *Freedman* procedures when speech occurs on private land. The circuit courts make no such distinction. *Granite State Outdoor v. City of St. Petersburg,* 348 F.3d 1278 (11th Cir. 2004); *Utah Animal Rights Coal. v. Salt Lake City Corp.,* 371 F.3d 1248 (10th Cir. 2004); *Southern Oregon Barter Fair v. Jackson County, Oregon,* 372 F.3d 1128 (9th Cir. 2004). Review is not necessary to clarify *Thomas.*

There are no reasons to grant review in order to clarify the law or because the decision is in conflict with another court of appeals decision on an important matter. Supreme Court Rule 10(a).

## II. The Circuit Court Decision Was Correct.

### A. The Court of Appeals Did Not Create a "De Minimis" Exception to the First Amendment.

Petitioners' first reason for review claims that the circuit court erred by applying "essentially, rational basis review to viewpoint based regulations of signs on the belief that exemption from the requirements of obtaining a permit and going through design review has only 'incidental effects' upon speech." Petition, p. 8. Petitioners assert that this "new 'di minimus' [sic] exception to strict scrutiny" threatens First Amendment jurisprudence. *Id.* The circuit court opinion creates no such distinction. Petitioners' real disagreement with the decision is with its application of settled Supreme Court case law to conclude that no content or viewpoint distinctions are made in the ordinance.

In the proceedings below, Petitioners claimed that the sign code classified on the basis of the content of signs or viewpoints expressed in the signs' message because the code precluded most pole signs after an amortization period, because the visual characteristics of a sign must be ascertained to see if a change of copy regulation applies, and because the code classified on the basis of sign location, use of the property where the sign was displayed, or generic identity of the property user (such as distinguishing between signs in commercial zones as opposed to residential zones).

In rejecting these contentions, the circuit court relied on established Supreme Court precedents. The court quoted *Turner Broadcasting*, 512 U.S. at 643, to hold that, on its face, the pole sign regulation does not "distinguishes

favored speech from disfavored speech on the basis of the ideas or views expressed." *G.K. Ltd. Travel v. City of Lake Oswego,* 436 F.2d 1064, 1071 (9th Cir. 2006). The pole sign limitation did not create exceptions for preferred content. *Id.*

The Ninth Circuit later quoted *Turner* for the proposition that "[l]aws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Id.* at 1077, citing *Turner Broadcasting,* 512 U.S. at 658. But it held that the exemptions from the permitting requirements for publicly owned signs in the rights of way, hospital signs and railroad signs "say nothing of the City's preference for the content of these speakers' messages, nor do they allow the City to discriminate against disfavored speech." *Id.* This holding is correct and a plain application of *Turner.*

Finally, the Court of Appeals rejected Petitioners' argument that reviewing the appearance of a sign to see if a change of copy occurred is a content-based regulation simply because the sign has to be viewed to apply the ordinance. The court relied on the holding in *Hill v. Colorado,* 530 U.S. at 721, that, "[w]e have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." *Id.* at p. 1079. In arguing that this application of *Hill* is incorrect, Petitioners do not even quote or analyze the precedent.

Instead, Petitioners appear to claim that the court tolerated a limited number of content-based exceptions from the permitting requirements, and created a "di minimus" exception from the general strict scrutiny test. The decision did no such thing. The district court severed

very few subject matter exceptions to the permitting requirement from the remaining parts of the law, and that determination was not appealed. The circuit court found that none of the other exceptions to the requirement to obtain a sign permit were based on the content of the sign's message. It did not state that constitutional justification for speech content regulations can be avoided. Indeed, the Ninth Circuit has overturned a sign code because of subject-matter distinctions in the classes of signs exempt from permitting requirements. *Nat'l Adver. v. City of Orange,* 861 F.2d 246 (9th Cir. 1988). The *G.K. Ltd. Travel* case does no violence to this principle.

### B. The Limitation on Pole Signs Advances Substantial Governmental Interests.

In arguing for their second reason for review, Petitioners quibble with the Ninth Circuit's application of *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) to the City's phase-out of pole signs, in favor of ground-mounted and wall signs of the same dimensions. Petitioners assert that there was conflicting evidence on whether the ordained purposes of the sign code matched the true intent of the city council; they argue that the "personal aesthetic values of officials" is not a significant governmental interest and that there was no proof that the sign structure regulation would advance community aesthetics or traffic safety. Petition, pp. 9-14.

Again, Petitioners do not complain that the circuit court misstates the law. They only claim that the Court of Appeals was insensitive to their arguments about the

application of *Ward*. The court rejected Petitioners' arguments because they were wrong.

Regulations of the physical characteristics of signs are nearly always sustained by the courts. The constitutional rationale is neither novel nor complex. As stated by this Court in *City of Ladue*, 512 U.S. at 48, "[i]t is common ground that governments may regulate the physical characteristics of signs – just as they can, with reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise."

This Court has identified the types of evidence that can be relied upon to show pole sign limitations advance the purposes of the sign code. That test, which was quoted and applied by the circuit court, was set out in *Lorillard Tobacco*, 533 U.S. at 555 ("We have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.'") Petitioners do not apply the *Lorillard Tobacco* test in their Petition.

The city council concluded that monument and wall signs better advance community aesthetics and the pedestrian orientation of the city's business districts, than tall pole signs. That judgment was based upon testimony and evidence received at hearings. Contrary to Petitioners' assertions, this Court and other courts defer to this type of legislative judgment in the regulation of signs or the manner of speech. *See, Metromedia*, 453 U.S. at 509-510 ("We likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and

substantial hazards to traffic safety. . . . We reach a similar result with respect to the second asserted justification for the – advancement of the city's esthetic interests."); *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 299, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984) and cases cited above at p. 10.

The justification is more demanding when the regulation is on the content of speech. *Edenfield v. Fane,* 507 U.S. 761, 113 S. Ct. 1729, 123 L. Ed. 2d 543 (1993) (ban on solicitation by public accountants). That is not the case here. The Court of Appeals was correct in deferring to the means-ends judgment of the city council, and alternatively concluding that the pole sign restriction "was the result of much legislative deliberation, a dynamic dialogue with the City's residents and businesses and hearings . . . [and] the experience of other cities. . . . This evidence provided the City with legitimate and relevant bases for advancing its Sign Code and restricting the availability of pole signs." *G.K. Ltd. Travel,* 436 F.3d at 1073.[4]

[4] Respondents dispute that there was conflicting evidence that the ordained purposes of the sign code (LOC 47.03.010) were not the purposes of the legislative body adopting the code (Petition, p. 9), that this is the first circuit court case upholding the regulation of signage based on aesthetic interests (Petition, pp. 9-10), that the only evidence in the legislative history of the sign code on aesthetics was "comments of a few officials" (Petition, p. 13), that the distaste for pole signs was not shared by "anyone outside the city planning department" (Petition, p. 13), that the pole sign limitation does not apply to "messages by certain speakers that city officials like" (Petition, p. 13), and that the record, current research or common sense shows that taller signs are more safe (Petition, p. 14).

### C. An Administrative Permitting Process is Appropriate.

Petitioners' third reason for review claims that the circuit court erred in not confining the application of *Thomas v. Chicago Park District*, 534 U.S. 316, to activities on public land. *Thomas* narrowed the requirements for a prior restraint of speech stated in *Freedman v. Maryland*, 380 U.S. 51, (limiting restraint to a short period of time with swift and full recourse to judicial review). *Thomas* held that when a speech licensing regulation is a content-neutral time, place and manner regulation of the use of a public forum, the procedural safeguards of *Freedman* do not apply.

As noted earlier, cases apply *Thomas* to speech activity in private and public fora. Generally, content-neutral sign regulations need not contain the *Freedman* protections. Moreover, even if *Thomas* is confined to speech in a public forum, the code at issue restricts signs visible from public ways, consequences measured in a public forum. LOC 47.04.105 (exempt signs); E-15. Finally, it does not make any sense, as suggested by Petitioners, that there be a greater justification or more procedural restrictions for regulating speech on private land than in a public forum. *Perry Educ. Ass'n v. Perry Local Educ. Ass'n,* 460 U.S. 37, 46, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983) (lower burden to justify regulation of speech on private land, in a non-public forum).

The Court of Appeals did not err in applying *Thomas*.

### D. The Design Review Criteria Are Not Unconstitutionally Vague.

Petitioners state that the Court of Appeals erred in concluding that the criteria for issuing a sign permit are not unconstitutionally vague. LOC 47.06.200(4) requires that,

> Signs shall be designed to be compatible with other nearby signs, other elements of street and site furniture and with adjacent structures. Compatibility shall be determined by relationships of the elements of form, proportion, scale, color, materials, surface treatment, overall sign size and the size and style of lettering.

E-18.

The Court of Appeals found that subjectivity alone did not render the sign code unconstitutionally vague. *G.K. Ltd. Travel*, 436 F.3d at 1085.[5] Relying upon *Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972), the court held that mathematical certainty was not required, that the criteria for determining compatibility were sufficiently precise, and that issues of compatibility were difficult to define in completely objective terms. *Id.* at 1085.

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[5] The court earlier found, in a related argument about "unbridled discretion," that the compatibility standards were specific and had not been used to censor speech. The court relied upon *Thomas* and *Ward* to require that permitting standards be "reasonably specific" and not precluded because they are "flexible." Petitioners do not address these precedents. *G.K. Ltd. Travel v. City of Lake Oswego, supra*, at pp. 1083-1084.

As noted above, Petitioners failed to contest Respondents' legal assertions about the vagueness of the ordinance; the district court found that Petitioners did not preserve this claim. The Due Process issue of vagueness (raised in the seventeenth claim for relief) is different than the First Amendment "unbridled discretion" claim (pleaded in the fourteenth claim for relief), despite Petitioners conflating the two. *See,* Amended Complaint, pp. F-26-27, F-30. Thus, to reach the issue of vagueness, this Court would need to first overturn the district court's determination of failure to contest.

Moreover, even if preserved, the Court of Appeals was correct that the 14th Amendment does not require that laws be written only in objective terms. Petitioners cite no precedent to this effect, only cases that state an intolerance for laws with such a high degree of subjectivity that the meaning must be guessed, where the laws pose a significant risk of arbitrary application. Those circumstances are not present here.[6]

### E. There Are No Jury Questions.

Petitioners' last reason for review is that the grant of summary judgment to Respondents robbed Petitioners of their constitutional right to a trial by jury, in that there were conflicting issues of fact for jury resolution. Petitioners state that there are "[t]hree seminal, genuine issues of material fact," as follows: "whether the city's purposes are real and are constitutional; whether the city delegates

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[6] Petitioners' recitation of evidence presented in a subsequent municipal court enforcement proceeding is improper and disputed. Petition, pp. 17-18.

unbridled discretion to its employees by allowing them to rely upon subjective criteria in deciding whether to issue a sign permit; and whether the standards of the Sign Code's design review clause applied in the permitting process are unconstitutionally vague. . . ." Petition, p. 21. Petitioners later inconsistently argue that the design review criteria are unconstitutionally vague "as a matter of law." Petition, p. 29.

First, as noted above, Petitioners have no right to a jury trial on the claims related to the design review section of the sign code. Those claims seek declaratory and injunctive relief based upon the text of the law, not its application to Petitioners. The only jury claims, the only claims for damages based on the application of the sign code, concern the part of the code limiting pole signs after May, 2004 (first and fourth claims for relief). So the purposes of the design review provision and the subjectivity or vagueness of its standards are not jury questions.

Second, there are no fact questions about the purposes of the sign code. They are stated in LOC 47.03.010. The preservation of the City's aesthetic quality and the protection of traffic safety are, in the words of the Court of Appeals, "oft-invoked objectives with a rich history of judicial enforcement." *G.K. Ltd. Travel*, 436 F.3d at 1072. It is completely irrelevant that these purposes are not standards for permitting decisions under the code as trumpeted by Petitioners. Petition, p. 25. The fact that LOC 47.03.010 is not used in making administrative decisions in 2004 does not create an issue of fact about the legislative purposes in enacting the sign code policies in 1994.

Third, Petitioners only pleaded claims about whether the text of the code was impermissibly vague or conferred too much discretion to administrative decision makers. These are issues of law, not issues of fact, on which summary judgment was proper.

Finally, this is not an appropriate case to develop the law of summary judgment. Petitioners themselves sought summary judgment on claims that they now argue are inappropriate for summary adjudication (the first and fourth claims for relief).[7]

### F. Conclusions.

The decision under review breaks no new ground. It does not decide an important question or federal law that has not been, but should be, settled by the Supreme Court. The holdings in the decision are consistent with the relevant decisions of this Court. Supreme Court Rule 10(c). Petitioners merely disagree with the application of settled law to their claims.

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[7] Respondents also dispute the factual accuracy of Petitioners' assertions that the "the input that citizens provided was ignored" (Petition, p. 22), that the "city produced little evidence of its legislative history between the 1994 and 2000 revisions" (Petition, p. 23), that consideration of changes to the design review provisions was "permanently tabled" in 1999 (Petition, p. 24), that there is a "75% reduction in visibility" caused by lowering signs (Petition, p. 25), that eliminating classifications based on the content of signs is inconsistent with the code's stated purposes (Petition, pp. 25-26), and that the stated purposes of the sign code are "not discussed in any city records" (Petition, p. 26). Respondents cannot respond to Petitioners' claim that a New Hampshire trial court is confused without a citation to a judicial opinion.

## CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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In The

# Supreme Court of the United States

G.K. LTD. TRAVEL, W. H. GILLISON, KATHLEEN KUSUDO and RAMSAY SIGNS, INC.,

*Petitioners,*

v.

CITY OF LAKE OSWEGO and SANDY INGALLS,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS


| | Page |
|---|---|
| INTRODUCTION | 1 |
| REBUTTAL TO FACTUAL BASIS FOR OPPOSITION BRIEF | 1 |
| RESPONSE TO RESPONDENTS' FIRST AMENDMENT ARGUMENTS | 6 |
| CONCLUSION | 10 |

## TABLE OF AUTHORITIES

Page

CASES:

*American Amusement Machine Assoc. v. Kendrick*, 244 F.3d 572 (7th Cir. 2001) ..... 9

*City of Ladue v. Gilleo*, 512 U.S. 43 (1994) ..... 8, 9

*Dills v. City of Marietta*, 674 F.2d 1377 (11th Cir. 1982) ..... 7

*Hill v. Colorado*, 530 U.S. 703 (2000) ..... 10

*Lindsay v. City of San Antonio*, 821 F.2d 1103 (5th Cir. 1987) ..... 7, 8

*Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) ..... 8

*Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) .... 6, 7, 8

*Members of the City Council v. Taxpayer's for Vincent*, 466 U.S. 789 (1984) ..... 9

*Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) ..... 6, 8

*New England Regional Council of Carpenters v. Kinton*, 284 F.3d 9 (1st Cir. 2002) ..... 9

*Pearson v. Edgar*, 153 F.3d 397 (7th Cir. 1998) ..... 7

*Sable Communications of Calif., Inc. v. F.C.C.*, 492 U.S. 115 (1989) ..... 7

*Thomas v. City of Chicago Park District*, 534 U.S. 316 (2002) ..... 2, 9

*Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622 (1994) ..... 7

*U.S. v. Kokinda*, 497 U.S. 720 (1990) ..... 9, 10

TABLE OF AUTHORITIES – Continued

Page

RULES:

Supreme Court Rule 15(6) ..... 1

APPENDICES

A Jurisdictional Comments of Municipal Court Judge, Garden Center Trial Transcript, Day 1 ..... A-1

B Direct Testimony of Darryl Eddy, Garden Center Trial Transcript, Day 2 ..... B-1

C Direct Testimony of Darryl Eddy, Garden Center Trial Transcript, Day 2 ..... C-1

D Direct Testimony of City Manager Doug Schmitz, Garden Center Trial Transcript, Day 2 ..... D-1

E Direct Testimony of Robert Galante, Garden Center Trial Transcript, Day 3 ..... E-1

F Direct Testimony of Robert Galante, Garden Center Trial Transcript, Day 3 ..... F-1

G ReDirect Testimony of Robert Galante, Garden Center Trial Transcript, Day 3 ..... G-1

H Direct Testimony of City Planner Hamid Pishvaie, Garden Center Trial Transcript, Day 3 ..... H-1

I Direct Testimony of Darryl Paulsen, Garden Center Trial Transcript, Day 3 ..... I-1

J Photograph of Sign Granted Icon Status ..... J-1

## INTRODUCTION

Respondents raise several new points in their Brief in Opposition to Petition for Writ of Certiorari. These issues are set out largely in their "Questions Presented." Respondents question what issues have been presented before the lower courts and are thus appropriately before this Court. Respondents also assert that Petitioners misstate the record of the case. Finally, Respondents raise new issues regarding the First Amendment issues presented. Pursuant to Supreme Court Rule 15(6) Petitioners file this reply.

## REBUTTAL TO FACTUAL BASIS FOR OPPOSITION BRIEF

Respondents "Introduction" misrepresents the scope of issues petitioners identified and the nature of relief they seek. Petitioners contend the jury must resolve *all* conflicts in evidence supporting material facts, not just part of it. Respondents next claim that "[t]he preserved issues on appeal are narrower than stated in the Petition." All five issues are timely raised. Petitioners first challenged the new identity/viewpoint based exemption created in the Ninth Circuit opinion. They next contend the city failed to produce sufficient evidence to meet its burden of proving compliance with the Time, Place and Manner Test (TPM) or *Central Hudson* test. *See*, Petitioners' *Amended Reply*,[1] ER 259-267. Petitioners raised the absence of a federal jurisdiction to enter summary judgment for the city in their *Rule 60(b)(4) Motion to Vacate Opinion and Related Orders*, filed before judgment entered. ER 376-385. These issues are raised again in their appellate *Opening Brief* at pp. 15-43; and *Reply Brief* at pp. 2-7.

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[1] The *Amended Reply* granted by the district court substantially modified its original counterpart, and was filed prior to the entry of judgment. The *Opening Brief* and *Reply Brief* are Petitioners Court of Appeals Briefs.

Petitioners' next challenged the district court's decision to decrease existing *Freedman* protections now guaranteed in private forums found in its novel application of *Thomas v. City of Chicago Park District*, 534 U.S. 316 (2002) later ratified by the appeals court. *See, Opening Brief* at pp. 51-53, and Petition. The fourth issue petitioners raised is the city's unconstitutional application of its design review clause. *See, Second Amended Complaint* ER 9-10; *Amended Reply*, ER 264-266; *Opening Brief*, pp. 53-56; and *Reply Brief*, pp. 4-5. The final issue raised is whether the summary judgment is void where material conflicts in the evidence over material facts have yet to be presented to a jury. *See Rule 60(b)(4) Motion to Vacate Opinion and Order*, pp. 376-385; *Opening Brief*, pp. 56-59; and *Petition for Rehearing*.

Petitioners have always made an issue of respondents' burden of proving the city complied with the First Amendment prior to imposing restrictions on speech. None of the city's evidence shows: 1) that the City identified harm caused by the banned pole signs; or 2) that the city discussed the community's substantial or significant interests in addressing that harm; or 3) that the city attempted to determine whether new regulations restricting speech would materially further identifiable community interests; or 4) that the city carefully calculated and weighed alternative ways of addressing the harm and determined that imposing the new regulations left affected speakers with reasonable alternatives to continue communicating with their target audiences.

Respondents cite their *Motion for Summary Judgment* and the *Opposition Memorandum* to show petitioners abandoned claims. However, the *Plaintiffs' Amended Reply to Motions for Summary Judgment ("Amended Reply")* raises all of the issues respondents allege were abandoned. ER 247-290.

On the theory that the petitioners "distort the truth," respondents present a sanitized, after-the-fact rationalization of the city's legislative process, citing documents

offered as examples of unresolved material conflicts in the evidence in petitioners' appendix. Some portions of their record admit that officials purposely employ subjective standards to regulate signs in order to limit commercial expression to expression that "looks right" to city officials. What "looks right" varies from city official to city official and from day to day.[2] In light of testimonial admissions by officials against the city's interests at a municipal trial last May, combined with recent activity on the city's redevelopment plan for the Lake Grove commercial district, it seems that "what looks right" is whatever fits the city's redevelopment plans.[3]

The city's selective and scattered citations to the record fail to provide competent or sufficient evidence proving First Amendment compliance. The record is fraught with conflicting evidence and admissions against interest, including evidence showing the city is motivated by the unconstitutional purpose of suppressing speech through the use of unbridled discretion.[4] The limited scope of the documents it submitted provides no consideration of how, or if, the sign regulations would achieve their stated purposes, other than the unconstitutional purpose of censoring speech.[5]

Respondents' claims on pages 8 through 10 of their brief are materially contradicted by collateral evidence from the municipal court, developed after G.K. Travel

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[2] The City Council minutes show the degree of control exercised by the planning department. However, testimony given in the Garden Center Trial further shows a practice of unbridled discretion in the handling of sign permits. Testimony of D. Paulsen, at App. I-1-I-5.

[3] Testimony of R. Galante, at App. F-1; G-1-G-4.

[4] ER at 196.

[5] For instance, Hamid Pishvaie testified that the staff did not know how the sign dimensions allowed in the sign code were derived, and therefore would not know if the arbitrary reductions in sign height, size and changes in design that staff required furthered the purposes for the basic regulations or not, at App. H-8-H-11.

judgment entered. Effective May 22, 2004 all of the pole signs in the Lake Grove district were banned. The City soon passed a new law creating an exception allowing pole signs to be lowered and remain in substantially the same place with the same appearance if they were community "icons."[6] Lake Grove Garden Center, two blocks from G.K. Travel, also had a pole sign. Its owner, Mr. Darryl Eddy applied for a newly created "icon exemption" before removing it. It met the physical characteristics and longevity requirements for icon signs.[7] City Manager Schmitz had final say on the permit application.[8] He denied it concluding that his sign was not an "icon."[9]

Mr. Eddy kept the sign. The city issued twenty-one citations between August of 2004 and the conclusion of trial in May, 2005. Mr. Eddy and his business were convicted following a three day trial in April and June of 2005. He had no right to a jury. During trial the city redevelopment official Robert Galante testified as a hostile witness. His testimony establishes the city did not comply and cannot prove it complied with First Amendment standards restricting its police power to restrict speech.[10]

He could not recall the city identifying any harm associated with pole signs or other banned signs. He couldn't remember city officials deliberating over specific government interests that would be advanced by the language of the proposed regulation. He affirmed that the city's purposes in reenacting the code were to complete an

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[6] Testimony of D. Schmitz, at App. D-2-D-4.

[7] Testimony of D. Eddy, at App. C-1.

[8] Testimony of D. Schmitz, at App. D-7.

[9] Testimony of D. Schmitz, at App. D-5-D-8.

[10] Testimony of R. Galante, at App. E-2-E-3 (lack of evidence in the record showing harms in the community relating to pole signs and aesthetics); at App. E-3-E-4 (discussing aesthetic goal of seeing building architecture, but no basis for the City to believe that the restriction on pole signs would have any impact on achieving this goal).

annexation deal and change language to make the code appear to be facially content neutral, while applying it in the same fashion it had been applied before.[11]

Hamid Pishvaie, head administrator of the city's design review policies, testified about a memo he prepared in 2000. He identified pictures showing that the city continues to use the design review process to make sure proposed expression "looks right" by arbitrarily reducing the size, height, and altering the content of most proposed signs including replacement signs for the banned pole signs.[12] This is consonant with an appendix document reporting an official's comments about an applicant who felt he might as well just let the city design his sign in the first place. Petition, App. L-23, para. 2.

Other parts of the city court record show that *Freedman* prior restraint protections cannot be enforced in spirit, because the municipal judge decided that he has no jurisdiction to entertain First Amendment challenges in his court.[13] He made it clear he will resolve all sign code challenges under rational basis. *See* ISA Amicus Brief, App. 1, p. 3, para. 3.

The Garden Center record presents a very compelling post-judgment example of the city's admitted practice of unconstitutional censorship. A permit denial involving Garden Center's effort to retain its sign was based entirely upon the subjective whims of City Manager Schmitz. He took the witness stand and testified at length about the city's post-judgment icon status exemption. He admitted

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[11] Testimony of R. Galante, at App. G-2-G-3 (current code was based upon a 1985 ordinance, but that none of the evidence justifying that regulation are available).

[12] Testimony of H. Pishvaie, at App. H-2-H-6 (discussing using the design review clause to justify reducing the size and height of signs).

[13] Statements of Court, First Day of Trial, Reply, at App. A-1-A-4; Amicus Brief of International Sign Association, App. A-3.

that Mr. Eddy's sign fit the city's "objective" standards, that he was solely responsible for denying the exemption, and his decision was subjective.[14] Mr. Eddy testified that one of the two merchants approved for icon status said he did not have to prove his sign qualified.[15] Schmitz testified that one of the reasons Mr. Eddy's sign was not an icon was because it was a rectangular box mounted on poles.[16] That description fits one of the other two signs he did grant the exemption to.[17] The entire body of Schmitz' testimony about why he denied the permit is chilling and shows why *Freedman* protections must be restored.[18]

## RESPONSE TO RESPONDENTS' FIRST AMENDMENT ARGUMENTS

Petitioners presented issues related to the regulation of speech by the city. The fact that the challenged regulations restrict sign height and size does not make them any less regulations of speech. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001) (explaining, "[sign] height restriction is an attempt to regulate directly the communicative impact of indoor advertising."). Petitioners challenge the manner in which the city regulates those characteristics. The primary question presented by this case is: how the First Amendment should apply to regulations of on-premise signs.[19]

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[14] Testimony of D. Schmitz, at App. D-3-D-6.

[15] Testimony of D. Eddy, at App. B-1, B-2.

[16] Testimony of D. Schmitz, at App. D-8, D-9.

[17] *See*, "LAKE OSWEGO COUNCIL SAYS ENFORCE SIGN CODE," The Oregonian, September 7, 2000, pg. D03, at App. J-1.

[18] Testimony of D. Schmitz, at App. D-1-D-16.

[19] Petitioners use the phrase "on-premise signs" to distinguish the facts in this case from *Metromedia v. City of San Diego*, where this Court addressed the law of billboards, or "off-premise" signs. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981).

Respondents argue there is no split of authority in the Ninth Circuit, or among the Circuits, on the questions presented. However, the cases they cite show a significant split exists. The opinion below demonstrates the disparity in First Amendment jurisprudence between sign cases and other general applications of TPM. In *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 639 (1994), this Court reviewed the physical characteristics of cable transmission, and concluded that, "whatever relevance these physical characteristics may have in the evaluation of particular cable regulations, they do not require the alteration of settled principles of our First Amendment jurisprudence." Likewise, general First Amendment principles should apply to on-premise signs.

When applying TPM to on-premise signs, some courts have expressed reservations about conducting a review stricter than that required by rational basis. In *Lindsay v. City of San Antonio*, 821 F.2d 1103, 1110 (5th Cir. 1987), the Fifth Circuit was reluctant to inquire into the city's evidence supporting the determination that the sign ordinance would further aesthetics. That reluctance is inconsistent with *Dills v. City of Marietta*, 674 F.2d 1377, 1381 (11th Cir. 1982), *cert. denied*, 461 U.S. 905 (1983), where the Eleventh Circuit held a regulation of on-premise signs was unconstitutional where the City put forward no evidence supporting it. *See also*, *Pearson v. Edgar*, 153 F.3d 397, 403 (7th Cir. 1998) (*Central Hudson* test could not be satisfied without evidence). These cases followed the level of analysis applied in *Turner Broadcasting* and *Lorillard Tobacco*, where this Court explained that deference to legislative judgment did not mean blindly accepting the government's rationales. *See*, *Turner Broadcasting*, 512 U.S. at 664; *Lorillard Tobacco*, 533 U.S. at 566. As explained in *Sable Communications of Calif., Inc. v. F.C.C.*, 492 U.S. 115, 129 (1989), "*Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.*" (emphasis added).

This Court's rulings on on-premise signs in the past have applied general principles of First Amendment jurisprudence.[20] Applying TPM requires a determination of whether the regulations directly and materially further the City's interest in aesthetics. However, reviewing regulations of speech to determine if aesthetics is furthered is nearly impossible. *See, Lindsay*, 821 F.2d at 1109. The primary concern is that there are no objective standards that can be used to review aesthetic based regulations. The nature of the subjectivity is so great that a City could argue that *any* regulation of signs – whether it be requiring monument signs, or requiring pink lettering – furthers its aesthetic interest. Accepting aesthetics as a substantial governmental interest to regulate speech is to reduce TPM or the *Central Hudson* Test to Rational Basis level of review. No more in-depth review is possible.

The respondents cite *Lorillard Tobacco* contending "Federal cases consistently hold that regulations of speech can be justified by history, consensus and simple common sense." Opp. Brief, p. 12. Whose common sense applies? The city claims banning pole signs furthers traffic safety. However, "common sense" suggests that the opposite would occur. Drivers looking for a destination that cannot find the sign quick enough to respond, are more likely to make dangerous, erratic, maneuvers than those that can easily find the sign. Respondents argue its "common sense" that drivers will be distracted by the sign and pay less attention to the roadway. The danger of relying on "common sense," is that there is no standard. "Common sense is sometimes another word for prejudice, and the common sense reaction to the . . . ordinance could be

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[20] *See, City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (time, place and manner test); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (applying *Central Hudson*); *Metromedia v. City of San Diego*, 453 U.S. 490 (applying Strict Scrutiny to content-based regulation); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (applying *Central Hudson* to on-premise tobacco advertisements).

overcome by social scientific evidence . . . " *American Amusement Machine Assoc. v. Kendrick*, 244 F.3d 572, 579 (7th Cir. 2001).

Respondents also assert that there is no split in applications of *Thomas v. Chicago Park*, as it appears to be consistently applied by courts in omitting "public forum" from its holding. *Thomas*, however, clarified how *Freedman* protections applied within public forums. *See*, *New England Regional Council of Carpenters v. Kinton*, 284 F.3d 9, 21 (1st Cir. 2002). This Court has long recognized that the First Amendment applies differently based upon *how* speech is regulated as well as *where* the speech is regulated. In this case the speech regulated is on private property. Therefore it is inherently more protected than speech in non-public forums. *See*, *Members of the City Council v. Taxpayer's for Vincent*, 466 U.S. 789, 811 (1984). *See also*, *City of Ladue v. Gilleo*, 512 U.S. 43, 50 (1994) (explaining that *Taxpayers for Vincent* was primarily a Non-public forum case.). *See also*, *U.S. v. Kokinda*, 497 U.S. 720, 726-727 (1990) (discussing the tripartite framework for determining how government interests as property owner are balanced against speech rights of citizens).

Respondents argue that even if *Thomas* was limited to "public forums" that the *Freedman* protections would not apply in this case because the signs regulated are "visible from public ways, consequences measured in a public forum." Opp. Brief at 19. This argument is inconsistent with prior caselaw. The "reasonableness" standard was applied in *U.S. v. Kokinda*, to a sidewalk entirely on Federal land that solely served a Post Office. That sidewalk was deemed a "non-public forum," even though it was visible from a sidewalk along a highway – two traditional public forums.

Respondents' argument also misses the policy concerns underlying the forum analysis. The purpose of public forum analysis is to evaluate "when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the

property for other purposes." *U.S. v. Kokinda*, 497 U.S. at 726. Respondents do not explain how treating private property like a public forum helps balance government power over government land with speech rights of citizens.

Respondents cite to *Hill v. Colorado*, 530 U.S. 703 (2000) to show its code is content-neutral. This Court explained, "it was the fact that the statute placed a prohibition on discussion of particular topics, while others were allowed, that was constitutionally repugnant." *Hill v. Colorado*, 530 U.S. at 722-723. The city's restriction on new signs granted a viewpoint based benefit to older businesses in town to the detriment of any new comers. Petitioners have consistently argued that those provisions should be required to satisfy strict scrutiny.

## CONCLUSION

For the reasons stated above, and in Petitioners Petition and in the Amicus Brief, Petitioners request that the Petition for Certiorari be granted.

Respectfully submitted,

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**APPENDIX A**

IN THE MUNICIPAL COURT
OF THE CITY OF LAKE OSWEGO
COUNTY OF CLACKAMAS, STATE OF OREGON

| | | |
|---|---|---|
| CITY OF LAKE OSWEGO,<br>Plaintiff,<br>v.<br>LAKE GROVE GARDEN CENTER and DARRYL G. EDDY,<br>Defendants. | ) | No. 04-CI-61302, et cetera |

TRANSCRIPT OF PROCEEDINGS

* * *

April 18, 2005

* * *

[4] raised.

My ruling before, which I will again reiterate at this point in time, requires some historical discussion about how we got here.

Back in December of last year, we were set for trial on several of these matters: Lake Grove Garden Center Inc., and Mr. Darryl Eddy – or City of Lake Oswego v. Lake Grove Garden Center and Mr. Darryl Eddy.

At that time, the defendants submitted a demurrer raising constitutional issues, raising an as-applied constitutional defense. The demurrer was properly denied. Then I believed that and I still believe it. An as-applied constitutional defense for infringement upon rights of free speech and expression is a fact-based defense.

Demurrers are legally based. Demurrers are properly – on these types of constitutional issues – are properly raised when a facial challenge is made, either for vagueness or breadth. This is not a facial challenge to the statute. This is an as-applied.

But the demurrer – I then ruled that the demurrer, although denied, did, in fact, raise the defense at that point in time and additional time was taken for the parties to respond.

Based upon the defense, I have ruled that the City has an additional burden other than the elements of a [5] particular statute and that is to present evidence of the adoption of the Code by the City's executive branch. A substance of this particular evidence is up to the City, of course, but that element requires a showing that – and let me quote from a case I read over the weekend. You folks may have cited me to this, but I only got to it this weekend.

This is *City of Eugene v. Powlowski*. The cite is 116 Or App 186 and I quote: "The authority of a city to enact reasonable legislation to regulate conduct thought to be detrimental to the public interest is well recognized." And, of course, they make citation to that. "The City has broad constitutional latitude in fashioning a content and neutral law that regulates the manner of expression so long as the limitation is reasonable. But the limitation is unreasonable if it burdens expression that is otherwise constitutionally privileged."

In enacting a statute that infringes in any way upon constitutional provisions, protections, the City has to make a particular showing that they had a valid reason for doing it as this is a well justified public endeavor.

So what the City must show in this particular case to overcome this constitutional challenge is, in fact, that the City has taken this into account. This wasn't just, as an example, the mayor walking down the street bumping her head on a pole sign and deciding that she doesn't like pole [6] signs anymore. That, in fact, the benefit on the entire city has been taken into account.

Again, what evidence the City chooses to produce in that regard, it's up to the City. It's not my job to tell people what evidence to present on these cases.

But that's the limitation at that point in time. I don't believe it's my job, as a municipal court judge. I don't believe I have authority to go back, revisit the entire issue and substitute my particular belief regarding the benefit of the City versus what the City Council and staff may or may not have gone through at that point in time.

Additionally, and one thing I didn't point out is that, according to my review of the statutes applicable to this, there are several exceptions that might have verified the pole sign being in place historic.

There is the icon status. There is also the pole signs could be allowed if there was a – it was necessary to provide vision clearance at driveways or intersections when there's no alternatives.

I would expect the City to simply present the fact that that is – that a person has the ability to get that particular type of a variance and it hasn't been achieved in this particular case.

Whether or not that was because the variance was [7] not sought or whether the variance was sought and was denied, I would expect to see that. Again, if it's one of those

where someone has – I'm not going to be substituting my particular beliefs for what would be a variance officer's decision.

* * *

## APPENDIX B

IN THE MUNICIPAL COURT
OF THE CITY OF LAKE OSWEGO
COUNTY OF CLACKAMAS, STATE OF OREGON

| | | |
|---|---|---|
| CITY OF LAKE OSWEGO,<br>Plaintiff,<br>v.<br>LAKE GROVE GARDEN CENTER and DARRYL G. EDDY,<br>Defendants. | ) | No. 04-CI-61302, et cetera |

TRANSCRIPT OF PROCEEDINGS

* * *

May 26, 2005

* * *

[95] Q Prior to your application of the icon status – for the icon status, did you talk to other business owners about the icon status application process?

A I talked to Mike Buck, owner of Gubanc's Bar across the street. And my understanding is that –

MR. SERCOMBE: Objection on hearsay grounds.

THE COURT: Yeah.

If you're going to talk about what he said, then that would be hearsay.

THE WITNESS: Okay.

MR. BRAGG: Your Honor.

THE COURT: Go ahead.

MR. BRAGG: We move to admit the testimony on – the effect on – the effect the testimony had on Mr. Eddy, not necessarily the truth of those out-of-court statements.

THE COURT: Okay.

Let's hear what he has to say and we'll decide, then; okay?

[96] MR. BRAGG: Thank you.

THE COURT: Go ahead.

BY MR. BRAGG: (Continuing)

Q What was the substance of your conversation with –

A Okay. My comments that I wrote down at the time was – and this was on August 12, 2004. I told him that my sign application has been rejected based upon not having provided evidence of icon status.

He stated that his application had been approved when asked and he said that he had not provided any evidence of icon status.

Q Have you talked to any other business owners who applied for icon status?

* * *

## APPENDIX C

IN THE MUNICIPAL COURT
OF THE CITY OF LAKE OSWEGO
COUNTY OF CLACKAMAS, STATE OF OREGON

| | | |
|---|---|---|
| CITY OF LAKE OSWEGO,<br>Plaintiff,<br>v.<br>LAKE GROVE GARDEN CENTER And DARRYL G. EDDY,<br>Defendants. | ) | No. 04-CI-61302, et cetera |

TRANSCRIPT OF PROCEEDINGS

* * *

[100] Q Mr. Eddy, please continue. I believe you were discussing your comments to Doug Schmitz following review of a newspaper article –

A Sure.

Q – on the icon status.

A Okay. The notes I wrote down at the time was that I told Mr. Schmitz that, from the criteria of the amended sign code, my sign should qualify and apply under the amended code.

To my surprise, Mr. Schmitz emphatically returned with a statement that I would not get it.

Q Did he give any reasons at that time as to why you would not get it?

A Well, I commented that, then, from my understanding of the *Review* article and so forth that the Code was changed strictly for the benefit of the Giant Burger alone. He countered that several other businesses would qualify for the exception. I asked who those [101] businesses might be. And he said that they would have to wait until they actually applied.

Q To your knowledge, have any other businesses –

A I'm not aware of any other businesses except maybe the Gubanc's Restaurant.

Q And, when you were denied the icon status, you were of the impression that that was because in someway your sign was not viewed as an icon; is that correct? Did the City tell you that your sign was not an icon and that's why you were denied the icon status?

A The City denied the icon status because I was not an icon.

* * *

**APPENDIX D**

IN THE MUNICIPAL COURT
OF THE CITY OF LAKE OSWEGO
COUNTY OF CLACKAMAS, STATE OF OREGON

| | | |
|---|---|---|
| CITY OF LAKE OSWEGO,<br>Plaintiff,<br>v.<br>LAKE GROVE GARDEN CENTER and DARRYL G. EDDY,<br>Defendants. | ) | No. 04-CI-61302, et cetera |

TRANSCRIPT OF PROCEEDINGS

* * *

[167] MR. WINSTON: Okay, Your Honor.

I guess my biggest problem is this Code was passed with a discussion of objective and subjective standards and I can't tell for sure what they are and that's why I have this witness – that's one of the main reasons I have this witness up here.

And, Your Honor, part of it is tied to the fact that he has complete discretion in certain areas. And I'm going to move on to Mr. Eddy's case and the icon status and we're going to move on to the icon status statute.

THE COURT: Okay.

MR. WINSTON: Your Honor, I believe that's found in Exhibit 38, page 23.

And I'm going to approach the witness.

THE COURT: 38 (inaudible).

MR. BRAGG: Yes. The City's exhibit.

MR. WINSTON: I'm sorry, Your Honor.

MR. BRAGG: 38, page 23. 47.410 subsection 1E, I believe.

MR. WINSTON: Yes, sir.

THE COURT: Okay.

I'm sorry.

Would you gentlemen repeat that, please?

MR. BRAGG: Sure.

4710.410.1E. Exceptions in GC Zone. It's on page [168] 23 of Exhibit 38.

THE COURT: Thank you.

MR. BRAGG: Sure.

BY MR. WINSTON: (Continuing)

Q Mr. Schmitz, I'm showing you the City's exhibit notebook. I'm showing you a page labeled Exhibit 38, page 23 of 30; okay? I'd like to direct your attention to Section 4710.410. Could you describe what that is?

A The heading for the section is permanent signage requiring permit allowed in commercial zones. CG NC OC-R2.5 OC-NC and R25, essentially.

Q Okay. Now, I'd like to direct – now, have you read this statute before?

A Yes.

Q Would agree that this statute is known as the icon statute? Would that be a fair characterization?

MR. SERCOMBE: Object on the question.

It is an ordinance. It's not a statute.

MR. WINSTON: Ordinance.

THE COURT: Thank you.

Go ahead.

THE WITNESS: Section E under heading I – Free Standing Signs – references icon signage.

BY MR. WINSTON: (Continuing)

Q Okay. And I direct your attention to subparagraph [169] E; okay?

A Yes, sir.

Q And what's the heading on that?

A Exceptions in GC zone.

Q Is that the zone where Mr. Eddy's sign is located?

A Yes, sir.

Q Okay. And could you read the text of E? It's relatively brief.

A The City Manager may grant exceptions to the size and height limitations for monument signs under subsections 1A and 1C of this section, as well as exceptions to design standards of LOC 47.06.200(4) as necessary to allow an existing pole sign in the GC zone that was nonconforming prior to May 21, 2004, to be converted to a

monument sign on the same premises, provided that – would you like me to read the subheadings under that?

Q Yes. The first one.

A 1. The existing sign is widely recognized in the community as a unique symbolic icon identified with a particular era.

2. The sign has been continuously displayed unchanged for at least 20 years prior to the conversion.

3. The area of the sign does not exceed 50 square feet.

4. The conversion results in no change to the [170] face of the sign.

5. The height of the monument sign, including the base, does not exceed 10 feet.

Following conversion to a monument sign any exceptions allowed under this subsection 1E shall apply until there is an alteration or change of the sign, including any change of copy or until any change of use on the premises, at which time the sign shall be made to comply with all requirements of this chapter.

Q Okay. Now, you heard Mr. Eddy's testimony earlier; correct?

A Yes, sir.

Q And he applied for icon status; is that correct?

A Yes, sir.

Q And you made the decision about that; is that correct?

A Yes, sir.

Q And the decision –

MR. SERCOMBE: Your Honor, I think that Mr. Winston should question the witness from here and not standing right next to him.

THE COURT: Do you plan on referencing the Code any further?

MR. WINSTON: No. I was through.

THE COURT: Oh, okay.

[171] Proceed.

If you wouldn't mind.

Thank you.

MR. WINSTON: Well, I may need to, Your Honor, because I'm going to ask him a question (inaudible).

BY MR. WINSTON: (Continuing)

Q Okay. What was the reason that you denied icon status?

A E1. The existing sign is widely recognized in the community as a unique symbolic icon identified with a particular era.

Q Okay, sir. And I would like you to take a look at that legislation and tell me if there are any standards published for determining which signs are icons and which ones are not.

A I think that the statute speaks for itself in that there isn't; right?

Q You would agree there are no standards for determining what signs have enough status and what ones –

MR. SERCOMBE: Object.

The Ordinance speaks for itself. It sets out the standards for the determination.

MR. WINSTON: Your Honor, it sets out standards that describe the physical characteristics of the sign, how long it's been there, etc.

[172] But I'm focused on the icon part of it. And it has the City Manager making a decision as to which signs have icon status, which ones do not.

I'm trying to establish there are no standards for determining which ones are icons and which are not. It's completely within the discretion of the City Manager.

THE COURT: Mr. Winston –

SERCOMBE: And if the question is –

THE COURT: – and I don't mean any disrespect, but we can all read.

MR. WINSTON: Okay.

THE COURT: It's not there.

MR. WINSTON: Okay.

THE COURT: We all can read it.

MR. WINSTON: I just wanted to ask him if he (inaudible) was the case.

MR. SERCOMBE: Well, if you're asking him whether or not there are standards anywhere that he uses to determine whether or not something is identified with a particular area or iconic, that's a different question. But you asked him whether or not there were standards in this ordinance.

THE COURT: Gentlemen, my understanding of the question was as it related to the statute.

I assume Mr. Winston may follow up with standards [173] that are not listed in the statute.

MR. WINSTON: Yes, Your Honor.

THE COURT: All right.

Go ahead.

MR. WINSTON: Okay.

BY MR. WINSTON: (Continuing)

Q So you would agree that there are no standards listed in the statute for the icon status part?

THE COURT: Ordinance.

MR. WINSTON: In the Ordinance.

THE WITNESS: For icon.

BY MR. WINSTON: (Continuing)

Q And you're the only one that's empowered by that ordinance to make that determination?

A Correct to your last question.

Q Okay. Now, do you – are there standards that aren't in the statute that you rely on?

A Well –

MR. SERCOMBE: For determining whether –

MR. WINSTON: To determine whether or not –

MR. SERCOMBE: – or not something is a unique symbolic icon –

MR. WINSTON: Yes.

MR. SERCOMBE: – identified with a particular area?

[174] THE COURT: Mr. Sercombe, please.

Go ahead.

THE WITNESS: I don't necessarily agree with your first comment that there are no standards.

I think item 1 under E provides some general standards for what is an icon sign: Widely recognized in the community, a unique symbolic icon of a particular era.

Q Okay. So those are the standards you say you apply.

A Yes, sir.

Q In Mr. Eddy's case.

A Yes, sir.

Q How did you determine that it was not widely recognized (inaudible)? Or which part did you determine disqualified him icon status?

A It's a two cabinet – sign cabinets on a pole. There's nothing distinctive or unusual about that.

Q Oh. So may I infer that Lake Grove is filled with two signs on a pole all up and down the street?

THE COURT: That's argumentative, sir.

Please rephrase your question.

BY MR. WINSTON: (Continuing)

Q What is the basis of that conclusion?

MR. SERCOMBE: And would you kindly address the witness.

[175] MR. WINSTON: I will.

MR. SERCOMBE: Your Honor, I object to him –

MR. WINSTON: I think I'm done with this –

MR. SERCOMBE: – standing next to the witness.

MR. WINSTON: – now, Your Honor.

BY MR. WINSTON: (Continuing)

Q Okay. So let me – let me try to abbreviate this, if I can. And maybe you can just confirm my understanding of your testimony. And maybe it's easier – yeah.

Are there any standards that don't appear in the Code that you relied on to decide to deny Mr. Eddy permission for icon status?

A No.

Q No. How did you make a determination that the sign is not widely recognized in the community as an icon?

A There are signs just as there are buildings that are discussed, commented upon in the community. And that has never been one of them.

Q Do you have a record of what's been commented on by the community?

A No.

Q Do you believe a thousand people signing a petition to allow Darryl Eddy to keep his sign has any influence over your decision that it's not an icon – that it's relevant to your decision that it's not an icon?

[176] MR. SERCOMBE: I object to the form of question.

If he's asking was that considered as part of the decision on the icon application, he should. But I think he's asking if it's relevant at the same time.

THE COURT: It sounds like a two-part question.

Why don't you go ahead with the first part whether or not it was considered.

BY MR. WINSTON: (Continuing)

Q How did you determine whether or not it was considered an icon?

A It has not been in conversations I've had with members in the community, has not been listed, identified, the subject of commentary about it being unique, distinctive, characteristic of a particular era.

Q How many members of the community?

A I couldn't say. I –

Q A thousand?

A I couldn't say.

THE COURT: Mr. Winston, would you please allow him to answer the question.

BY MR. WINSTON: (Continuing)

Q You couldn't say.

A No.

Q Do you have any general idea?

A Over 100.

[177] Q When did you start contacting them?

A No. It's not you go out and ask the question. It's commentary when the sign debate is going – this sign debate has been going on. People make comments about signs.

Q What people?

A That's a sub – members of the community when I go to social events. I go to meetings. And this pole sign issue has been a subject of considerable discussion in the community and people make comments about signs.

Q So this is basically your circle – your impression of what your circle of friends say –

A I didn't say –

Q – and acquaintances say.

A – circle of friends. I said I go to meetings. I go to events and people comment about –

Q Is there anything –

A – the issue.

Q – scientific – I'm sorry. Okay.

Is there anything scientific about the way you decide who to ask about it?

A No.

Q Okay. So it's pretty subjective, isn't it?

A Well, subjective, if you disregard item I under section E of the Code.

Q Well, doesn't it allow you to deny icon status to [178] anybody who you go out in the community and talk to other people about if they don't think their sign is an icon? Isn't that the standard?

THE COURT: I didn't –

MR. SERCOMBE: That mischaracterized –

THE COURT: – the question.

MR. SERCOMBE: – the testimony.

THE COURT: Would you rephrase that question again, please.

MR. WINSTON: I'm trying to establish what standard he's applying.

THE COURT: I know what you're –

MR. WINSTON: Okay.

THE COURT: – trying to do.

I didn't understand that question.

MR. WINSTON: I'm sorry, Your Honor.

I'm going to move to a different question.

THE COURT: Okay.

BY MR. WINSTON: (Continuing)

Q How many applications have been made for icon status?

A Well, between two and four. And I say two to four because there were – or three. I'm sorry, three to five because there were three that I know of that were received. There were two that made inquiries and I'm not sure if they [179] followed up with the filing of an application.

Q Okay. So you're only aware of two of them applying?

A Three.

Q Three. Who were the three?

A The Giant Burger.

Q Uh-huh.

A Gubanc's.

Q Uh-huh.

A Lake Grove Garden Center.

Q Okay. Who did you consult – did Gubanc's – was Gubanc's granted icon status?

A Yes.

Q Okay. And who did you consult to determine whether Gubanc's sign was an icon?

MR. SERCOMBE: I know I have an objection to this line of questioning, but I think we're really going far afield once we move past Lake Grove Garden Center's application for the status and start talking about the Manager's determination in other applications for icon status. It's very far removed from the constitutionality of this particular ordinance that we're seeking to enforce.

Now, I understand that we're going down that in terms of talking about icon status and this particular defendant's application for it, but now we're talking about [180] other applications.

MR. WINSTON: Your Honor –

THE COURT: Objection is overruled.

MR. WINSTON: Okay.

THE WITNESS: Would you repeat the question?

THE COURT: Would you repeat the question, please?

MR. WINSTON: Okay.

BY MR. WINSTON: (Continuing)

Q Who did you consult when you made the decision to grant icon status to Gubanc's?

A I'm not sure I consulted anyone. It's –

Q How did you determine it was an icon?

A Because, when you go in a community to events and activities and meetings and people comment about issues that are pertinent to the City at that particular time – and in this particular time, it was the pole sign ordinance – a person said – there seemed to be a consensus that the Gubanc's sign was distinctive because it was circular, that it had been a beacon for that business for a period of time beyond the 20 years specified in the Ordinance, and it had characteristics that were unique and recognized within the community.

Q Who said that?

A Persons of the community at meetings, events.

Q Oh, you don't remember the specific individual or individuals?

A There were many individuals who made comments [181] about it.

Q And these were spontaneous comments?

A These were comments which people made at meetings, events, activities –

Q Okay.

A – that I attended during the time that the pole sign ordinance –

Q Are you a resident of the City of Lake Oswego?

A Yes, sir.

Q Okay. What's the population?

A 36,000 –

Q 36,000.

A – plus or minus 15.

Q So you got input in the Garden Center case from a hundred people out of 36,000?

A I didn't say a hundred. I said over a hundred. And I couldn't tell you exactly how many.

Q Why does that represent that large of a community's belief of whether it's an icon or not?

A Because that's the portion of the community I came in contact with on this particular matter –

Q Oh, I see.

A – that made comment about pole signs.

[182] Q Okay. And I guess the rest of the folks out there really don't matter.

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**APPENDIX E**

IN THE MUNICIPAL COURT
OF THE CITY OF LAKE OSWEGO

COUNTY OF CLACKAMAS, STATE OF OREGON

| | | |
|---|---|---|
| CITY OF LAKE OSWEGO,<br><br>Plaintiff,<br><br>v.<br><br>LAKE GROVE GARDEN CENTER And DARRYL G. EDDY,<br><br>Defendants. | ) | No. 04-CI-61302, et cetera |

TRANSCRIPT OF PROCEEDINGS

* * *

May 31, 2005

* * *

[12] A No.

Q Are there any documents – were there any documents produced by the City with regards to problems with aesthetics in pole signs, to the best of your recollection?

MR. SERCOMBE: Excuse me, are you talking about – are you talking about the documents that are – have been admitted into evidence or documents produced?

MR. BRAGG: I'm asking generally were there any documents.

MR. SERCOMBE: Produced to whom?

MR. BRAGG: Produced by the City. Created by the City.

MR. SERCOMBE: Oh.

MR. WINSTON: For the City's use.

THE COURT: Is that created by the staff of the City? Is that what you mean?

MR. BRAGG: Yes.

THE COURT: Okay.

Go ahead.

BY MR. BRAGG: (Continuing)

Q To the best of your recollection.

A Well, my recollection extends to the record in front of us at this point. So I don't believe there were documents outside of what we're looking at.

Q Okay. And to the extent you were able to review [13] the documents in front of you – I know there wasn't a lot of time and there's a lot of pages – is there anything in the plaintiff's exhibits that deal with aesthetics and show that there's a problem with aesthetics and pole signs?

MR. SERCOMBE: Objection.

The documents speak for themselves.

THE COURT: I'll sustain the objection.

I think it's pretty clear to all of us the answer is no for those of us that have reviewed it.

MR. BRAGG: Okay.

BY MR. BRAGG: (Continuing)

Q Turning to visibility, to the best of your recollection, what was the problem – what was the concern with visibility in pole signs? Who were they – who were you concerned wasn't being able – wasn't able to see the signs? Was the City concerned?

A Primarily motorists.

Q Okay.

THE COURT: I'm sorry, motor?

THE WITNESS: Motorists.

THE COURT: Motorists. Thank you. Okay.

BY MR. BRAGG: (Continuing)

Q What research did the City look at with regards to visibility and pole signs at the time?

A I'm not sure what you mean by "research."

* * *

[25] Q So I just want to make sure that I understand that your testimony is that a pole sign, which stands 18 feet tall on a single pole, blocks architect – the architectural style of a building more than a monument sign, which stands 8 feet tall and has a width varying from either a single pole, multiple poles or the width of the sign, a base, that goes all the way up 8 feet tall in front of the building. Is that what the City determined?

A Well, I – first of all, no. I think you're using width as I would use depth. And whether it has one pole or [26] two poles, I didn't distinguish.

When you were asking me about width earlier, I was talking about the width as it typically is perpendicular to the street. The width of the base, not the width of the sign.

Q Monument signs, you're saying, are usually perpendicular to the roadway, not parallel to it?

A They are most often, but not always perpendicular to a –

Q And the City determined that there was more of the building visible behind either the perpendicular monument sign, which is more of a block, than the taller pole sign?

A That was my recollection.

THE COURT: I'm sorry to interrupt, again.

* * *

## APPENDIX F

IN THE MUNICIPAL COURT
OF THE CITY OF LAKE OSWEGO

COUNTY OF CLACKAMAS, STATE OF OREGON

| | | |
|---|---|---|
| CITY OF LAKE OSWEGO,<br><br>Plaintiff,<br><br>v.<br><br>LAKE GROVE GARDEN CENTER And DARRYL G. EDDY,<br><br>Defendants. | ) | No. 04-CI-61302, et cetera |

TRANSCRIPT OF PROCEEDINGS

* * *

[30] Q Okay. So, with regards to all signs generally, then, were there other aesthetic concerns that the city staff had?

A There's a compatibility review section of the Sign Code, which outlines the aesthetic issues and concerns that should be addressed for a sign.

Q Did the city staff come up with an objective formula for applying that design review clause?

A There is no objective review possible for a subjective standard.

* * *

## APPENDIX G

IN THE MUNICIPAL COURT
OF THE CITY OF LAKE OSWEGO

COUNTY OF CLACKAMAS, STATE OF OREGON

| | | |
|---|---|---|
| CITY OF LAKE OSWEGO,<br><br>Plaintiff,<br><br>v.<br><br>LAKE GROVE GARDEN CENTER And DARRYL G. EDDY,<br><br>Defendants. | ) | No. 04-CI-61302, et cetera |

TRANSCRIPT OF PROCEEDINGS

* * *

[53] Q Was it, as reflected in City Council decisions over the past 12 years – has there been a desire by the Council to affect the character of the Lake Grove area?

A Yes.

Q And what's been that change or desire?

A Well, some number of years ago – and I'm not very specific on this because I don't manage the planning – haven't managed the planning department during that time so I haven't been specifically a part of it – but they did pursue Main Street program, which would create a more village character along Boones Ferry Road. And they did also fairly recently, even within the last few years, begin a study to look at creating a more village downtown character for the Lake Grove area.

Q And part of the desire to create a village character, does that involve having the signs at a lower level so that they're more visible to pedestrians and less oriented to motorists?

A That can often be one of the tools that's used to create that character.

Q Beyond the specific findings that were adopted by [54] the City Council, as reflected in Exhibit 11, do you have personal knowledge of the reasons why any individual councilor voted to adopt Ordinance 2085?

A Not at this point. I may have at some point in my life, but I don't recall.

MR. SERCOMBE: No further questions.

THE COURT: Redirect.

MR. BRAGG: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. BRAGG:

Q You were just asked several questions about the Sign Code enacted in 1985. Do you recall that testimony?

A Yes.

Q What were the harms present in the community relating to signs in 1985?

A I don't recall.

Q Do you recall if the City had any evidence in 1985 relating to harms present in the community – or relating to signs?

A No. I don't recall the evidence that we reviewed.

Q Has any of that evidence – would any of that evidence appear to be included in the exhibits – Plaintiff's Exhibits 1 through 38 in front of you, to the best of your knowledge?

MR. SERCOMBE: Object.

[55] The documents speak for themselves.

THE COURT: They do. I don't believe there's any there. I don't think any of us conclude that there is.

MR. BRAGG: Okay.

MR. SERCOMBE: Well, actually, Your Honor, there are references to the 1985 Code in several of the documents.

THE COURT: Yeah. I know the references are there, but the specific basis upon which the 1985 was adopted and the evidence they had I don't believe is there. I think we've all reviewed it and concluded that.

MR. BRAGG: Okay.

BY MR. BRAGG: (Continuing)

Q Exhibit 1 of Plaintiff's Exhibit 1, page 1, Section 4701, that appears to be the purposes section of the 1985 Sign Ordinance; is that correct?

A That's correct.

Q Do you have any reason to believe that there are purposes outside of those contained in Section 4701 and the adoption of that ordinance? Were there any other reasons for adopting Ordinance 1921 other than ones

stated in Section 47.010, to the best of your knowledge and recollection?

A (Inaudible.)

* * *

## APPENDIX H

IN THE MUNICIPAL COURT
OF THE CITY OF LAKE OSWEGO
COUNTY OF CLACKAMAS, STATE OF OREGON

| | | |
|---|---|---|
| CITY OF LAKE OSWEGO,<br>Plaintiff,<br>v.<br>LAKE GROVE GARDEN CENTER And DARRYL G. EDDY,<br>Defendants. | ) | No. 04-CI-61302, et cetera |

TRANSCRIPT OF PROCEEDINGS

* * *

[84] BY MR. BRAGG: (Continuing)

Q I'd like to go back to the issue of the interpretation of the design review clause and at this time direct the witness's attention to Exhibit 20. And page 3 of Exhibit 20. Are you familiar with this document?

A Minutes of Council Meeting from February 1st of 2000?

Q Exhibit 20.

THE COURT: It's Exhibit 20, sir.

THE WITNESS: Exhibit 20. Yes.

MR. WINSTON: He's on the first page, Your Honor. I think he said 3.

THE COURT: Oh, I'm sorry.

MR. BRAGG: Yeah.

THE WITNESS: Okay.

Am I familiar with this document?

MR. BRAGG: Yes.

THE WITNESS: It's the Minutes of the Council meeting.

MR. BRAGG: I think we're looking at different documents.

THE WITNESS: Are we?

THE COURT: Can I see –

THE WITNESS: You said Exhibit 20?

THE COURT: I think you need to go back further.

[85] THE WITNESS: Exhibit 20.

THE COURT: You're looking at page 1?

MR. BRAGG: I'm looking at page 3, Your Honor.

THE COURT: Page 3.

You're looking at page 35.

THE WITNESS: Page – oh, there are two page numbers here, I'm sorry.

THE COURT: I thought we were on wrong – different pages here.

THE WITNESS: These are attachments, I suppose, to Exhibit 20. Sorry.

THE COURT: It's all right.

THE WITNESS: Okay.

THE COURT: It should be a planning department memorandum.

THE WITNESS: Yes. I'm sorry. Yes.

BY MR. BRAGG: (Continuing)

Q Are you familiar with that document?

A It's a memo written by me three pages long. Yes.

Q Okay. Do you recall the general subject matter of this memo?

A If I recall, this memo was prepared in response to the Council's direction as to whether there was any need to rewrite the Code and, particularly, I think it related to compatibility issue and a directive stamp to go to the [86] Planning Commission and the Development Review Commission and get their input as to whether there was a need, again, to rewrite the Code.

Q Do you recall the City Council discussion leading up to that request?

A I think – actually, I don't. I have just vague memory as to what context it was brought up in.

Q Do you recall what your conclusion was?

MR. SERCOMBE: Object.

What his conclusion was about something he doesn't remember?

THE COURT: I'm sorry, what's the point?

BY MR. BRAGG: (Continuing)

Q Do you recall what the conclusion of the memorandum that you wrote on November 3, 1999, discussing the development review criteria that we were just talking about?

THE COURT: Doesn't the document speak for itself, sir?

I would prefer to look at his words at the time he wrote the document as opposed to what he remembers now six years later.

MR. BRAGG: Okay.

BY MR. BRAGG: (Continuing)

Q Turning to page 7 –

[87] A Of the same exhibit?

Q Of the same exhibit.

This was part of the attachment to your memorandum; is that correct?

A I take your word for it. I can't remember.

Q Okay. Can you describe what we're looking at on page 7?

A We're looking at a picture of the monument sign for Palisades Market, which is located on McVey Avenue.

Q Beneath the picture you've got a legend indicating a proposed versus approved.

A Uh-huh.

Q Could you explain what the difference is there?

A What the difference is?

Q Yes. What's the difference between the proposed and the approved?

MR. SERCOMBE: Objection.

He's already testified he doesn't recall this exhibit.

THE COURT: I think he can testify to what the legend would have been based upon the wording of it.

I'll overrule the objection.

THE WITNESS: Typically, the proposed imply what the original application was for and approved means what was ultimately approved.

[88] BY MR. BRAGG: (Continuing)

Q So, in this case, someone proposed a 32-square-foot sign and they were approved a sign that was 30.66 square feet?

A Correct.

Q And I understand that this was probably some time ago. Would the basis of this approval – this difference be related to the design review criteria, to the best of your recollection?

MR. SERCOMBE: Object.

Lack of foundation.

THE COURT: Well, if he remembers what the difference between the two was, as it applies to this particular sign, I'll allow him to answer.

THE WITNESS: I believe this project was approved. I don't believe I know this project was approved by DRC. That's short for Development Review Commission.

What I don't recall was the sign being reviewed as part of that process. It might have been. I do not recall that.

So this goes to a design compatibility issue. This was a major project in that neighborhood, the McVey neighborhood. It took a couple of years to actually go through the process.

So, as part of the design compatibility and the [89] sensitivity to the overall design of the project, most likely the size was reduced to the extent that you see in this exhibit.

Q Okay. Page 9 of Exhibit 20. Do you recognize this?

A I think this is a sign for a gas station on State Street.

Q Okay. And here they proposed 32 square feet and were approved 24 square feet; is that correct?

MR. SERCOMBE: Your Honor, again, I do have a continuing objection, not only to issues about compatibility review, but specific permits that were issued or not issued to the people. That was part of our motion in limine. And I do want to state a continuing objection to that.

THE COURT: I understand.

MR. SERCOMBE: The results of any particular other sign permit is completely irrelevant.

THE COURT: Mr. Bragg, I need to ask before I rule on whether or not to allow this testimony: Are we going – what is the purpose of going with each individual sign? Tell me your purpose.

MR. BRAGG: The purpose is to show that the City in the enforcement of its sign ordinance arbitrarily limits the size, height, dimensions of the sign. There's a lack of consistent standards from one to another and that that is [90] the case, generally, and then, specifically, with regards to our client, Garden Center.

THE COURT: How many of these do you intend to be going through?

MR. BRAGG: Your Honor, there are a number of pictures here, but I don't need to go through every one. I was going to just talk about a couple of them just to show that there was, in fact, that difference.

If the Court wants to take judicial notice that the pictures say what they say, we can move on to other questions.

THE COURT: I'd like you to be more general.

You do have a continuing objection, as it applies to this.

I'll give you a little bit of latitude, but I'd like to talk about generally the differences, as opposed to going to individuals because we really don't know the details of what ultimately got these people from their proposal to the

actual Sign Code, whether it's just something somebody decided by spinning a wheel or if it was a really thought-out process between the owners of these signs and the city staff.

MR. BRAGG: Okay.

THE COURT: And I don't want to – we could go forever in terms of coming up with that process.

[91] And perhaps I might suggest you could ask: Is this just something that you guys come up with randomly or what is gone through? And I think part of that's already been answered.

Go ahead.

BY MR. BRAGG: (Continuing)

Q Is the dimensions, the set height and the – that was approved and the approved square footage for Exhibit 20, page 9 – are those dimensions that the city staff came about randomly or was there some particular standards that were applied – or in general that would be applied?

A We don't come up with just random numbers. I mean, it's decided – I have 23 years of experience in planning and particularly administering the Sign Code over 18 years of experience. So nothing happens randomly. So it comes with other experience dealing with hundreds, if not thousands, of signs and so forth.

So, in terms of this particular one, I don't really recall the background, but I do remember meeting the property owner on the site myself two or three different times. And the sign was discussed. We looked at the way it was being

proposed, again, the relationship to its location to the sidewalks, relationship to the light poles, to the building, to the canopy over the pump station and a whole slew of issues. And, finally, I think, was kind of [92] consensus that that size was appropriate size for that location.

Q Did you give any consideration of visibility of the sign?

A Visibility of the sign. That is part of the process. Yes.

Q And a smaller sign is more visible than the proposed sign?

A That's another question. The question is: Is it visible and has visibility?

Q What's your background in visibility?

A It's common sense and experience that you employ in reviewing designs.

Q Have you reviewed any research on sign size with regards to traffic safety and visibility issues?

A Occasionally. Yes.

Q Which documents have you reviewed?

A I don't recall the name of it.

Q Are you aware of any documents in research on visibility that would have been reviewed by the City in drafting its ordinances?

A Yeah. (Inaudible.)

MR. SERCOMBE: Excuse me, is the question about any ordinance of the City? And, if so, then that's –

THE COURT: I think we're back to –

[93] MR. SERCOMBE: – irrelevant.

THE COURT: – '93, if I'm not mistaken; is that correct?

MR. SERCOMBE: Well, this particular ordinance.

MR. BRAGG: I was referring to generally the ordinances that would have been – that we've talked about regarding signs. If that's too general, then I can back up and ask the specific question for each ordinance, if you'd prefer.

MR. SERCOMBE: You just referred to ordinances and I didn't know if you were talking about the 1985 and 1994. He's testified he wasn't involved in those.

THE COURT: Well, the 2000 and the 2003, I think, he's testified did not involve the analysis process that you're getting at, if I'm not mistaken; okay? In fact, I've got a little note to myself to that effect.

So I think we're talking about back in '93-'94; is that your –

MR. BRAGG: That would be the –

THE COURT: Okay.

THE WITNESS: I don't recall. I wasn't involved, Your Honor. I don't recall.

THE COURT: Okay.

THE WITNESS: I don't know.

[94] BY MR. BRAGG: (Continuing)

Q So you don't know if research had been done to determine that the dimensions listed in the Sign Code were generally necessary for visibility?

MR. SERCOMBE: Asked and answered.

THE COURT: It's sustained.

BY MR. BRAGG: (Continuing)

Q Do you know where the dimensions that are listed in the sign ordinances – how those dimensions were (inaudible)?

A No, I don't.

Q So, in reducing the dimensions for a proposed sign, you don't know whether or not you're furthering the purpose for that particular dimension that was in the Code or not?

* * *

# APPENDIX I

IN THE MUNICIPAL COURT
OF THE CITY OF LAKE OSWEGO

COUNTY OF CLACKAMAS, STATE OF OREGON

| | | |
|---|---|---|
| CITY OF LAKE OSWEGO,<br><br>Plaintiff,<br><br>v.<br><br>LAKE GROVE GARDEN CENTER and DARRYL G. EDDY,<br><br>Defendants. | ) | No. 04-CI-61302, et cetera |

TRANSCRIPT OF PROCEEDINGS

* * *

[138] THE WITNESS: The application process depends on two different factors. One, if you're just changing the face on a sign, if you're changing the copy on the sign, you have to get a permit to change the copy. And, if that sign is nonconforming and you change the copy on it, then you have to bring it into conformance.

If you're seeking to put in a new sign, there's a another application for that. And you would make up a design, meet with your customer, get it approved, and submit that design with the application to the city. And then they would let you know whether or not they would grant you the square footage and height or colors that you were seeking to obtain for that customer.

Q In your application process, is it typical for you to go in there and apply for a sign of whatever dimensions and have that approved?

A In most municipalities they have a code regulation that outlines the square footage and height requirements. You make an application, based on those requirements, and submit it.

In Lake Oswego, it doesn't work that way.

[139] Q How does it work in Lake Oswego?

A You submit it and then they tell you what you can have.

Q And that goes to just the size limitations?

A Size and height.

Q Size and height. Were you here – were you present for Mr. Pishvaie's testimony?

A Yes.

Q And do you recall his comments that sign companies were getting better at having the earlier application comply with the Sign Code?

A Yes.

Q Do you agree with that statement?

A No, sir.

Q What's your take on –

A A reasonable person can't make an application for a sign permit in the city of Lake Oswego and get it approved.

Q Why not?

A Because there's no way to ascertain whether your design is going to meet the square footage or height that staff thinks you ought to have.

Q So, when you apply for a permit, what usually happens?

A They will get back to you and tell you that the [140] sign is not compatible. It should be probably 22 square feet instead of 32 square feet or 30 square feet. And it should be 6 foot tall, rather then 7 foot tall or 8 foot tall or whatever particular number they happen to pick.

Q And is there any further explanation usually given?

A There's no criteria associated with it on how you could meet the objectives of compatibility. None.

Q And you've been applying for signs in the city of Lake Oswego for how many years?

A Since '94.

Q Since '94.

In the dialogue that occurs with the City after a permit is applied for, is it often that the City concedes to allowing the applicant to continue with a particular design –

A No.

Q – if there's a dispute over a color? Whose decision typically –

A It's the City's.

Q And, if the permit that you want is denied, what's – have you taken the next step to get – to appeal to the Design Review Committee?

A It's very much cost prohibitive to the customer. I think the last variance we applied for was like $1200.

[141] And you have a period of time to go by during a process. And most people – most customers don't want to go through that expense and/or hassle in applying for it. And, even then, when you ask the City about a variance process, they'll tell you right – state up front that it's not likely you're going to get it.

Q And then taking it to the next step of the City Council, have you taken that step?

A We did that with GK Travel. We took it to variance. We took it to the DRC. We took it to Council. All were denied.

Q What were the costs associated with filing for the Council? Do you recall?

A Not right offhand. I think the total for all the process was close to $2,000, 1800, somewhere in that range.

THE COURT: Was that for both – I'm sorry.

THE WITNESS: Yes.

THE COURT: Was that all the way –

THE WITNESS: I think it was the whole –

THE COURT: – up to City Council?

THE WITNESS: – the whole process.

THE COURT: Both?

Okay.

THE WITNESS: Yeah.

That's not counting all the staff time that went [142] in, all the design time, and application process and all that.

BY MR. BRAGG: (Continuing)

Q So, from the time you file the initial application to the time that staff approves or denies it, approximately how long does that take?

A Well, it can be real brief if you go along with their recommendations. It can be any number of weeks if you don't want to go along with their recommendation and file for a variance or appeal their decision.

Q And while you're waiting for the application to be decided, the client is without a sign?

A That's correct.

Q What's the average cost of putting up a new sign? In the city of Lake Oswego, to be specific.

A Generally, in the industry we track our average cost of a sale, which is any number of different kinds of signs, but it's around 6 to $8,000 average.

* * *

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## APPENDIX J

Bill Krueger, co-owner of the Black Tartan, says he will have to replace the 15-foot sign that met right with a smaller version by spring 2004. Krueger says the 40-year-old sign is a community icon that shouldn't have to go.

The Oregonian,
"LAKE OSWEGO COUNCIL SAYS
ENFORCE SIGN CODE"
By Aimee Green,
Thursday, September 7, 2000; Edition: SUNRISE,
Section: LOCAL STORIES WEST ZONER NORTH SOUTH
SOUTHWEST, Page D03

25

Supreme Court, U.S.
FILED
JUL 17 2006
OFFICE OF THE CLERK

No. 05-1603

IN THE

# Supreme Court of the United States

G. K. LTD. TRAVEL, ET AL.,

*Petitioners,*

v.

CITY OF LAKE OSWEGO, OREGON, ET AL.,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## BRIEF FOR INTERNATIONAL SIGN ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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[July 17, 2006]

TABLE OF CONTENTS

INTEREST OF THE AMICI ..... 1

SUMMARY OF ARGUMENT ..... 1

ARGUMENT ..... 3

I. THE NINTH CIRCUIT'S REFUSAL TO APPLY *FREEDMAN* ABSENT A PUBLIC FORUM OR CONTENT NEUTRAL REGULATION IMPROPERLY EXTENDS *THOMAS*. ..... 3

A. The Background of *Freedman* and *Thomas* ..... 4

B. The Extension of *Thomas* in *G.K.* ..... 6

C. The *G.K.* Ordinance Is Not Content Neutral ..... 8

D. There Is No Showing That The Sign Code Contains Objective Standards ..... 12

II. THE USE OF SIGN CODE TO DEPRIVE BUSINESSES OF COMMERCIAL VIABILITY, THUS COMPELLING TRANSFER TO HIGHER-VALUE ENTERPRISES, DEROGATES FROM DUE PROCESS OF LAW ..... 14

A. Due Process ..... 14

B. Public Use ..... 16

III. THE CITY'S CUSTOM AND USAGE FAVORED THE REPLACEMENT OF EXISTING LAKE GROVE DISTRICT BUSINESSES WITH AN UPSCALE "TOWN CENTER" ..... 17

CONCLUSION ..... 20

APPENDIX

# TABLE OF AUTHORITIES

Page(s)

CASES

*44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).....3

*Adderly v. Florida*, 385 U.S. 39 (1966).....6

*Agins v. City of Tiburon*, 447 U.S. 255 (1980).....15

*Albright v. Oliver*, 510 U.S. 266 (1994).....14

*Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996).....3, 15

*Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1976).....3

*Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).....3

*Bennett v. City of Slidell*, 728 F.2d 762 (5th Cir. 1984), *cert. denied*, 472 U.S. 1016 (1985).....19

*Berman v. Parker*, 348 U.S. 26 (1954).....16

*Burk v. Augusta-Richmond County*, 365 F.3d 1247 (11th Cir. 2004).....7

*City of Lake Oswego v. Lake Grove Garden Center and Darryl Eddy*, Nos. 04-CI-61302 – 04-CI-63386, 04-CI-63389, 05-CI-63391, 05-CI-63392 (Lake Oswego Mun. Ct. June 1, 2005).....9

*City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002).....12

*Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985)...16

*Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301 (11th Cir. 2003) ..... 7

*Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) ..... 5

*Foti v. City of Menlo Park*, 146 F.3d 629 (9th Cir. 1998) ..... 10

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*FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990) ..... 4, 8

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*Graham v. Connor*, 490 U.S. 386 (1989) ..... 14

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*Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) ..... 16

*Kelo v. City of New London*, 125 S.Ct. 2655 (2005) ..... 16

*Kevin Gray –East Coast Auto Body v. Village of Nyack*, 566 N.Y.S.2d 795 (App. Div. 1991) ..... 11

*Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005) ..... 3, 15

*Madsen v. Women's Health Center*, 512 U.S. 753 (1994) ..... 8

*Monell v. Dept. of Social Services*, 436 U.S. 658 (1978) ..... 19

*Pearsall v. Richmond Redevelopment and Housing Auth.*, 242 S.E.2d 228 (Va. 1978) ..... 17

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*Santa Monica Food Not Bombs v. City of Santa Monica*, __ F.3d ___, 2006 WL 1666707 (9th Cir. June 16, 2006) ..... 7

*Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989) ..... 14

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*United States v. Grace*, 461 U.S. 171 (1983) ..... 6

*Ward v. Rock Against Racism*, 491 U.S. 781 (1989) ..... 8

STATUTES

42 U.S.C. § 1983 ..... 19

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Transcript, City of Lake Oswego v. Lake Grove Garden Center and Darryl G. Eddy, No. 04-CI-61302 (Municipal Ct. of City of Lake Oswego), Testimony of Robert Arthur Galante, May 27, 2005 ..... 13, 19, 20

Memorandum from Johnson Gardner, Economic Conditions Analysis for the Lake Grove Town Center Plan, Lake Oswego, Oregon (Sept. 30, 2002) at 4, *available at* www.ci.oswego.or.us/.../LGTC%20Report/Technical%20Appendix/Part%201%20LGTC%20Plan%20Technical%20Appendix.pdf ..... 2, 19

Dean Starkman, *Cities Use Eminent Domain to Clear Lots for Big-Box Stores*, WALL ST. J., Dec. 8, 2004 ..... 17

Lee van der Voo, *Lake Grove Plan Creates Concern: Some Business Owners Worry About What The Plan May, May Not, Include*, LAKE OSWEGO REVIEW, July 6, 2006 ..... 18

## INTEREST OF THE AMICI[1]

The International Sign Association (ISA) is a 1,900 member organization composed of manufacturers, users, and suppliers of on-premise signs and sign products produced by more than 400,000 employees in all 50 states and 69 foreign countries. ISA exists to support, promote, and improve the $30 billion-a-year sign industry, which sustains the nation's nearly $3 trillion-a-year retail industry. As such, the ISA and its members have a vital interest in the preservation of constitutional rights to free expression and private property.

## SUMMARY OF ARGUMENT

In *Freedman v. Maryland*,[2] this Court protected freedom of speech by requiring that restraints on expression prior to judicial review be brief, that the regulator expeditiously seek judicial review, and that the regulator bears the burden of proving the restraint's justification. More recently, in *Thomas v. Chicago Park District*,[3] the Court held that all of the procedural safeguards of *Freedman* were not necessary where government sought to coordinate uses of its own public forum through content-neutral regulations. Even then, however, authorities could not possess unbridled discretion, nor could they stifle free expression.

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[1] The parties have consented to the filing of this brief in letters of consent on file with the Clerk. No counsel for any party had any role in authoring this brief, and no one other than the *amici curiae* provided any monetary contribution to its preparation or submission.

[2] 380 U.S. 51 (1965).

[3] 534 U.S. 316 (2002).

The Ninth Circuit's opinion in *G.K Travel v. City of Lake Oswego* (*G.K.*)[4] represents a significant expansion of this Court's *Thomas* exception to *Freedman*, since it applies *Thomas* to private premises that are not public fora. *G.K.* also illustrates the dangers to free expression that this expansion poses. While the City's sign code purports to be content-neutral, its design and implementation support the City's intent to hasten the conversion of the Lake Grove district from laid-back, traditional to one contemplating a high-density upscale "town center."

The City discerns redevelopment opportunity from strong retail demand and an aging stock of buildings. However, "many of the local businesses are thriving and the remaining economic life of existing improvements will preclude widespread redevelopment."[5]

Prohibitions against the substitution of the name of a new business owner for a predecessor, together with a lack of standards and delay in the review of sign permit applications, has reduced the viability of existing businesses and, as a practical matter, may compel sales of land to more strongly financed "town center" developers.

In addition to violating the petitioners' First and Fifth Amendment Rights, such conduct is arbitrary and capricious and violates petitioners' rights under the Fifth and Fourteenth Amendment Due Process Clauses. Until this Court's decision

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[4] Pet. App. A; 436 F.3d 1064 (9th Cir. 2006), *pet. for cert.* filed June 13, 2006 (NO. 05-1603).

[5] Memorandum from Johnson Gardner, Economic Conditions Analysis for the Lake Grove Town Center Plan, Lake Oswego, Oregon (Sept. 30, 2002) at 4, *available at* www.ci.oswego.or.us/.../LGTC%20Report/Technical%20Appendix/Part%201%20LGTC%20Plan%20Technical%20Appendix.pdf

last year in *Lingle v. Chevron U.S.A., Inc.*,[6] however, Ninth Circuit precedent precluded petitioners from asserting substantive due process claims.[7]

There are two reasons why certiorari should be granted in this case, the judgment vacated, and matter remanded for further proceedings. First, the Ninth Circuit's unwarranted extension of the scope of the *Thomas* exception wrongfully absolved the respondents of the burden of proof that would be theirs under the *Freedman* standard. Second, the Ninth Circuit's erroneous interpretation of the Due Process Clause deprived petitioners of an opportunity to raise substantive due process claims.

## ARGUMENT

### I. THE NINTH CIRCUIT'S REFUSAL TO APPLY *FREEDMAN* ABSENT A PUBLIC FORUM OR CONTENT NEUTRAL REGULATION IMPROPERLY EXTENDS *THOMAS*.

As this Court has noted, "[t]he text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct."[8] "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[9]

The Ninth Circuit earlier recognized that "[c]ommunication by signs and posters is virtually pure speech."[10] Signs contain expressive content as well as a

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[6] 544 U.S. 528 (2005).

[7] Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) (en banc).

[8] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 512 (1996).

[9] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

[10] Baldwin v. Redwood City, 540 F.2d 1360, 1366 (9th Cir. 1976).

physical presence. In *Freedman v. Maryland*,[11] this Court established procedural safeguards against the arbitrary exercise of discretion of prior restraint of speech and the lack of procedures protecting against the exercise of prior restraint.[12]

### A. The Background of *Freedman* and *Thomas*.

The defendant in *Freedman* had been convicted of exhibiting a film not submitted to the State Board of Censors. This Court overturned that conviction, holding that prior restraint on the exhibition of a motion picture was constitutional only if

> (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.[13]

In *Thomas v. Chicago Park District*,[14] this Court deemed *Freedman*'s procedural safeguards "inapposite," because the regulation at issue was "not subject-matter censorship but content-neutral time, place, and manner regulation of the use of a public forum."[15] Nevertheless, *Thomas* noted that the park ordinance contained a detailed list of reasons for permit

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[11] 380 U.S. 51 (1965).

[12] *Id.* at 58-60.

[13] FW/PBS, Inc. v. Dallas, 493 U.S. 215, 227 (1990) (principal opinion of O'Connor, J., joined by Stevens and Kennedy, JJ.) (citing *Freedman*, 380 U.S. at 58-60).

[14] 534 U.S. 316 (2002).

[15] *Id.* at 322.

denial,[16] that denial could occur only for one of the listed reasons, that applications must be processed within 28 days, and that reasons for denial had to be clearly explained.[17] "These grounds are reasonably specific and objective, and do not leave the decision 'to the whim of the administrator.'"[18] Furthermore, permit denials could be appealed to the park district administrator and the courts.[19]

The regulatory scheme challenged in *Thomas* required "a person to obtain a permit in order to 'conduct a public assembly, parade, picnic, or other event involving more than fifty individuals,'" or using amplified sound.[20] As Justice Scalia explained for the Court:

> The picnicker and soccer player, no less than the political activist or parade marshal, must apply for a permit if the 50-person limit is to be exceeded. And the object of the permit system ... is not to exclude communication of a particular content, but to coordinate multiple uses of limited space, to assure preservation of the park facilities .... and to assure financial accountability for damage cause by the event."[21]

Thus, the restriction in *Thomas* allows the Park District, the owner of the land maintained by it as a public forum, to allocate and protect the use of its valuable resource. Those

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[16] *Id.* at 319 n.1

[17] *Id.* at 324.

[18] *Id.* (quoting Forsyth County v. Nationalist Movement, 505 U.S. 123, 133 (1992)).

[19] *Id.*

[20] *Id.* at 318.

[21] *Id.* at 321.

who obtain permits for family reunions, soccer games and political events are transients. They do not own the resource and have little individual incentive to protect it. As this Court has declared with reference to displays in its own building, "[t]he Government, 'no less than a private owner of property, has the power to preserve the property under its control.'"[22]

### B. The Extension of *Thomas* in *G.K.*

In *G.K.*, the Ninth Circuit applied *Thomas* instead of providing the procedural safeguards of *Freedman*.

While *Thomas* stressed the need for coordination of uses of a government public forum, and the need to maintain and protect that forum,[23] those factors do not apply to on-site sign regulation. The person with the long-term interest in protecting the sign and the business that it enhances is not the regulator, but the landowner subject to regulation. The municipality imposes restrictions primarily for the benefit of the voters, whose cultural preferences and financial well-being command the solicitude of local officials. The possibility that officials may impair the free expression and property rights of minorities are what the First and Fifth Amendments are designed to protect against. Therefore the Ninth Circuit erred in *G.K.* by applying the *Thomas* exception.

The Ninth Circuit first expanded the *Thomas* exception in *Southern Oregon Barter Fair v. Jackson County*,[24] where it held *Freedman* inapplicable in a case adjudicating the Oregon Mass Gathering Act.

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[22] United States v. Grace, 461 U.S. 171, 178 (1983) (quoting Adderly v. Florida, 385 U.S. 39, 47 (1966)).

[23] 534 U.S. at 322-23.

[24] 372 F.3d 1128 (9th Cir.2004), *cert. denied*, 126 S.Ct. 367 (2005).

> The Act applies to all mass gatherings irrespective of the purpose for the gathering. ... [T]he Act does not single out any particular activity or speech for regulation. It authorizes the Department of Human Services to promulgate regulations with respect to water supply, fire p.otection, and similar health and safety issues attendant on overnight gatherings of large crowds. *None of these health and safety issues has anything to do with censoring the content of the applicant's speech.*[25]

Last month, in *Santa Monica Food Not Bombs v. City of Santa Monica*,[26] the Ninth Circuit similarly upheld a requirement that "distributors of free food must comply with '[a]pplicable State health and safety standards regulating food service and distribution.'" The court noted that restrictions on food distribution, lying on public sidewalks, and the like, "are not forms of conduct integral to, or commonly associated with, expression."[27] It concluded, citing *Barter Fair*, that "[w]hether food distribution can be expressive activity protected by the First Amendment under particular circumstances is a question to be decided in an as-applied challenge, should one be brought."[28]

Other courts have distinguished *Thomas* as being applicable to all activities in parks, not communicative activity as such.[29]

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[25] *Id.* at 1137 (emphasis added).

[26] ___ F.3d ____, 2006 WL 1666707 (9th Cir. June 16, 2006).

[27] *Id.* at 2006 WL 1666707 *7.

[28] *Id.* (*citing* Barter Fair, 372 F.3d at 1135).

[29] Burk v. Augusta-Richmond County, 365 F.3d 1247, 1254-55 (11th Cir. 2004). *See also*, Fly Fish, Inc. v. City of Cocoa Beach, 337 F.3d 1301 (11th Cir. 2003) (restrictions on adult entertainment); Topanga

In *G.K.*, substantial information and evidence in related litigation reveals that the City's purpose in imposing ostensibly content-neutral bans on pole signs and subjective regulations on other signs in the Lake Grove district included inducing the departure of businesses from the traditionally eclectic area and replacing them with an upscale "Town Center" development.[30]

### C. The *G.K.* Ordinance Is Not Content Neutral.

Just as *G.K.* fails to comport with the "public forum" prong of *Thomas*, it fails to comport with the "content neutral" prong as well. As this Court noted in *Ward v. Rock Against Racism*:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.[31]

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Press, Inc. v. City of Los Angeles, 409 F.Supp.2d 1188 (C.D. Cal. 2005) ("Nothing in *Thomas* undermines FW/PBS 's [FW/PBS, Inc. v. Dallas, 493 U.S. 215, 227 (1990)] applicability to this case, which does not involve a public forum."). *Cf.* Granite State Outdoor Advertising, Inc. v. City of St. Petersburg, 348 F.3d 1278, 1282 n.3 (11th Cir. 2003) (following *Thomas* where examination limited to whether sign related to on-site or off-site activity).

[30] *See Part III, infra.*

[31] 491 U.S. 781, 791 (1989). *See also*, Madsen v. Women's Health Center, 512 U.S. 753, 763 (1994) ("We ... look to the government's purpose as the threshold consideration.")

*Thomas* itself warned:

> Of course even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression. Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content. We have thus required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review.[32]

Nowhere in its opinion does the Ninth Circuit demand substantial studies supporting the need for, and attempts to tailor, the sign ordinance beyond general claims of aesthetic values. In this it is similar to a case in the local court, where another Lake Grove district merchant was convicted of maintaining a nonconforming pole sign after the May 21, 2004 termination date for all such signs. The trial judge rejected the defense that the ordinance was unconstitutional, stating that "it is not the appropriate position of this court to probe for the 'real purpose' of the City Council when the purpose is clearly stated [in the sign code]."[33]

The Lake Oswego ordinance, as it existed before nonconforming pole signs were prohibited, provided that "[a] non-conforming sign ... may be maintained or undergo a change of copy without complying with the requirements of this chapter, with the exception that any change for a new business ... will comply ...."[34] There was no aesthetic reason

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[32] *Thomas*, 534 U.S. at 323 (internal references omitted).

[33] App. A at 3, *City of Lake Oswego v. Lake Grove Garden Center and Darryl Eddy*, Nos. 04-CI-61302 – 04-CI-63386, 04-CI-63389, 05-CI-63391, 05-CI-63392 (Lake Oswego Mun. Ct. June 1, 2005).

[34] Pet. App. A at 3, n.2; 436 F.3d at 1068 n.2.

why a change in business name should be singled out for unfavorable treatment. Furthermore, amortization of a sign pertains to the recovery of the tangible and intangible investment in the sign, which is not inherently a function of the sign's current ownership. In this respect, the sale of a nonconforming sign should fare no differently than the sale of a nonconforming business or other nonconforming property, where the existing use continues under the new owner.

The Ninth Circuit declared that *Foti v. City of Menlo Park*[35] stood for the proposition that whether a sign regulation is content-based depends on "'whether the ordinance singles out certain speech for differential treatment based on *the* idea expressed.'"[36] "City officials have to read signs only to determine whether the text of the sign or a logo on the sign has changed .... As the city notes, even those who speak no English could perform this superficial review function."[37] From that observation, the Ninth Circuit concluded that the regulation was not content based.[38]

Likewise, the trial court declared that the *Foti* test "does not make sense when the applicable government regulation is not based on a sign's message but is, instead, based on a sign's appearance or change in its appearance. As such, the fact that a law enforcement officer has to examine a sign to determine its legality is not always dispositive."[39]

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[35] 146 F.3d 629 (9th Cir. 1998)

[36] Pet. App. A at 24; 436 F.3d at 1078 (quoting *Foti*, 146 F.3d at 636 n.7) (emphasis added).

[37] *Id.*; 436 F.3d at 1079.

[38] *Id.*

[39] Pet. App. B at 10; 2004 WL 817142 at *5.

However, it is not as simple as that. A sign, or sign restriction, may express more than one idea. Restrictions on changes of content may be restrictions on content. A code that permits a faded sign to be repainted with fresh and highly visible lettering indicates a proclivity to preservation. A sign painted in the same manner as before, but with the substituted name of a new proprietor of a business, indicates to the community that a business is under new management. It does not take a very literate sign examiner to observe that Lake Oswego had a preference for the old and disdain for the transfer and revitalization of businesses. Businesses often advertise themselves "under new management" because that information resonates with the public. If the City's intent is to reduce the adaptability of existing small businesses, prohibitions on sign alterations proclaiming new ownership, and stringent restrictions on changes of any sort, are good ways to achieve that substantive goal.

In another case involving a transfer of business ownership and an ordinance prohibiting the alteration of the text of nonconforming signs, *Kevin Gray-East Coast Auto Body v. Village of Nyack*,[40] the New York appellate court held that the plaintiff had established a prima facie case that the zoning ordinance violated his First Amendment right of free speech. "Generally, absent a showing that the *predominant purpose* of an ordinance is not to control the content of the message . . ., such truthful commercial speech may not be prohibited on the basis of its content alone."[41]

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[40] 566 N.Y.S.2d 795 (App. Div. 1991). *Accord*, Ray's Stateline Market, Inc. v. Town of Pelham, 665 A.2d 1068, 1070 (N.H. 1995).

[41] *Id.* at 796 (emphasis added).

### D. There Is No Showing That The Sign Code Contains Objective Standards.

While time, place, and manner regulation is not subject to strict scrutiny, but rather "comparatively softer intermediate scrutiny"[42] such regulation must have *some* boundaries. Hence the requirement in *Thomas* that they "contain adequate standards to guide the official's decision and render it subject to effective judicial review."[43]

Notably, the Ninth Circuit opinion does not require studies, empirical data, or other objective referents for the City's sign code. Illustrating its deferential approach, it justifies the City's exception from permit requirements and fees of certain institutions, such as hospitals and railroads, on the grounds that the exceptions constitute preferences for certain speakers and "say nothing of the City's preference for the content of these speakers' messages."[44] In fact, there is an inextricable connection between what the institutions are and what they say.

The Ninth Circuit explains: "With respect to the Code's permitting process ... there is admittedly an element of subjectivity to the determination of 'compatibility.'"[45] However, the following dialogue at a City Council meeting reviewing possible amendments to sign regulations indicates another possible City motivation:

> Council President Rohde spoke to removing the subjective review section from the sign code. He said that business people have told him that they needed a

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[42] City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 455 (2002).

[43] *Thomas*, 534 U.S. at 323 (internal references omitted).

[44] Pet. App. A at 20-21; 436 F.3d at 1077.

[45] Pet. App. A at 38; 436 F.3d at 1085.

> sign code with a basic criteria [sic] to which they could adhere. He stated that they found this subjective review clause requiring signs compatible with other nearby signs, elements of street, site furniture, and adjacent structures to be one of the biggest problems with the code. ...
>
> Mr. [Tom] Coffee [Assistant City Manager and Planning Director] discussed the difficulty of legislating aesthetics and design. He pointed out that, even with specific standards, someone would come in with something that met the standards but still did not look right. He argued that, *without the subjective review clause, staff had no ability to turn down any sign that ostensibly met the standard.* He mentioned the tension between aesthetic quality and certainty.[46]

In recent testimony in another case involving sign regulation in the Lake Grove district, the City's Redevelopment Director, and former senior planner, stated that "[t]here's a compatibility review section of the Sign Code, which outlines the aesthetic issues and concerns that should be addressed for a sign." He then was asked: "Did the city staff come up with an objective formula for applying that design review clause?" His response: "There is no objective review possible for a subjective standard."[47]

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[46] Pet. App. L at 23, City Council Study Session Minutes, September 14, 1999, "Results of 1998 Sign Inventory and Review of Possible Amendments to Sign Regulations (emphasis added).

[47] App. B at 2, Transcript, City of Lake Oswego v. Lake Grove Garden Center and Darryl G. Eddy, No. 04-CI-61302 (Municipal Ct. of City of Lake Oswego), Testimony of Robert Arthur Galante, May 27, 2005.

## II. THE USE OF SIGN CODES TO DEPRIVE BUSINESSES OF COMMERCIAL VIABILITY, THUS COMPELLING TRANSFER TO HIGHER-VALUE ENTERPRISES, DEROGATES FROM DUE PROCESS OF LAW.

### A. Due Process.

Through the time of the district court's decision in *G.K.*, the settled Ninth Circuit rule was that petitioners had no cause of action under the Fifth and Fourteenth Amendment Due Process Clauses. In 2005, however, this Court clarified the viability of due process claims.

In *Graham v. Connor*,[48] this Court held that a claim for physical injuries, asserted to result from excessive force in a police investigatory stop, should be analyzed under the Fourth Amendment's "objective reasonableness" standard, instead of under the substantive due process standard. "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'"[49]

In *Sinaloa Lake Owners Ass'n v. City of Simi Valley*[50] a Ninth Circuit panel held that *Graham* does not bar a companion substantive due process claim where "the government has used its power in an abusive, irrational or

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[48] 490 U.S. 386 (1989).

[49] Albright v. Oliver, 510 U.S. 266, 273 (1994) (quoting *Graham*, 490 U.S. at 395).

[50] 882 F.2d 1398, 1408-09 n.10 (9th Cir. 1989).

malicious way." In *Armendariz v. Penman*,[51] the Ninth Circuit rejected this approach *en banc*. It declared that "*Sinaloa*'s somewhat off-hand dismissal of *Graham* was wholly inconsistent" with judicial self-restraint.[52]

However, in *Lingle v. Chevron U.S.A., Inc.*,[53] this Court made clear, in the course of clarifying its takings jurisprudence, that due process claims were not subsumed within the Takings Clause:

> Instead of addressing a challenged regulation's effect on private property, the "substantially advances" inquiry probes the regulation's underlying validity. But such [a due process] inquiry is *logically prior to and distinct from* the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose.[54]

The petitioners averred in their First Amended Complaint that "[t]he First Amendment to the United States Constitution protects plaintiffs and others from arbitrary and discriminatory enforcement of vague standards.[55] While concepts of vague and arbitrary rules and conduct permeate the proceedings, the petitioners should have an opportunity to

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[51] 75 F.3d 1311 (9th Cir. 1996) (en banc).

[52] *Id.* at 1326.

[53] 544 U.S. 528 (2005).

[54] 125 S.Ct. at 2084 (discussing Agins v. City of Tiburon, 447 U.S. 255, 260-61 (1980) (stating that a regulation constitutes a taking if it "does not substantially advance legitimate state interests")) (emphasis added).

[55] Pet. App. F at 30 (Petitioner's First Amended Complaint, ¶ 115).

raise these issues in an appropriate Fifth Amendment, Fourteenth Amendment, and Civil Rights Act[56] context.

**B. Public Use.**

While petitioners did not press their takings claims in the Ninth Circuit,[57] shortly before the oral argument this Court interpreted the Fifth Amendment's Public Use so as to provide more stringent procedural protections for landowners than in its prior cases.[58] Writing for the Court in *Kelo v. City of New London*, Justice Stevens held that condemnation for retransfer for economic development is a permissible public use, but recognized that such transfers of property, "executed outside the confines of an integrated development plan ... would certainly raise a suspicion that a private purpose was afoot."[59]

Justice Kennedy was even more emphatic: "A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose."[60] Notably, he cited this Court's precedent[61] often identified

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[56] 42 U.S.C. § 1983.

[57] Pet. App. A at 7 n.5; 436 F.3d at 1064 n.5.

[58] *See* Berman v. Parker, 348 U.S. 26, 33 (1954); Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984).

[59] 125 S.Ct. 2655, 2667 (2005).

[60] *Id.* at 2669 (Kennedy, J., concurring).

[61] *Id.* (citing Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)).

with probing review sometimes termed rational basis "with bite."[62]

As a broader picture of the goals of the respondents emerges, the *G.K.* petitioners may have meritorious claims that the Public Use Clause was violated through signage regulations depriving traditional business of commercial viability and thus, in effect, compelling sales to upscale developers. The growing importance of condemnation for retransfer for private economic development,[63] coupled with municipal actions that would reduce the value of parcels intended by the locality for other purposes,[64] makes particularly timely that the petitioners have an opportunity to raise this issue on remand.

## III. THE CITY'S CUSTOM AND USAGE FAVORED THE REPLACEMENT OF EXISTING LAKE GROVE DISTRICT BUSINESSES WITH AN UPSCALE "TOWN CENTER".

The Ninth Circuit rejected the petitioners' assertion that the Sign Code's review clause was so subjective as to allow officials to manipulate it to censor expression.

> Plaintiffs are unable to identify a single case of actual censorship of content by the permitting authority. ... Sometimes, as plaintiffs identify, the dialogue with the

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[62] Gerald Gunther, *Forward, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-24 (1972).

[63] *See, e.g.*, Dean Starkman, *Cities Use Eminent Domain to Clear Lots for Big-Box Stores*, WALL ST. J., Dec. 8, 2004, at B1. ("Desperate for tax revenue, cities and towns across the country now routinely take property from unwilling sellers to make way for big-box retailers.")

[64] *See, e.g.*, Pearsall v. Richmond Redevelopment and Housing Auth., 242 S.E.2d 228, 229 (Va. 1978) (discussing "condemnation blight").

> City breeds resentment or frustration ... Nonetheless, frustration of those who are regulated by the Sign Code is not sufficient evidence that the regulators are granted unbridled discretion.[65]

Others, however, are less certain that the Sign Code is administered fairly. The City's mayor spoke of "major dissatisfaction in the community with respect to the sign code," and suggested that 67 pole signs continue to be grandfathered.[66]

The lack of information and citizen input in the planning process has resulted in considerable community dissatisfaction. "Through petitions, members of the commercial association gathered more than 2,300 signatures from patrons at 60 Lake Grove businesses this spring in an effort to force the economic impact study."[67]

Much of this feeling of ill-treatment has become apparent only since the district court proceedings. Also, the subtlety of abuses of discretion and feeling that one "can't fight city hall" arise as well. Finally, a change of counsel at trial may have affected petitioners' ability to uncover specific abuses, as well.[68]

A locality that deprives an individual of federally protected rights "under color of any statute, ordinance,

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[65] Pet. App. A at 35-36; 436 F.3d at 1084.

[66] Pet. App. L at 27, City Council Minutes, May 2, 2000.

[67] Lee van der Voo, Lake Grove Plan Creates Concern: Some Business Owners Worry About What the Plan May, May Not, Include, *Lake Oswego Review*, July 6, 2006.

[68] Pet. App. B at 1; G.K. Ltd. Travel v. City of Oswego, 2004 WL 817142 *1 (D. Or. 2004) (not published in F.Supp.2d).

regulation, custom, or usage of any State" is civilly liable under federal law.[69]

A report submitted the City's marketing and development consultants, shortly after *G.K.* was filed in federal court, noted that the

> demand for retail space along [a main corridor in the Lake Grove district] is fairly strong, and the aging existing stock presents an opportunity for redevelopment. *However, many of the local businesses are thriving and the remaining economic life of existing improvements will preclude widespread redevelopment in the Town Center area.*[70]

In his testimony last year in another case pertaining to the City's sign code, the Director of the Lake Oswego Redevelopment Agency, Robert Galante, was asked if it is "generally the City's desire … to encourage a change of commercial uses or change in the character of the Lake Grove district?" He responded "Yes."[71] Mr. Galante added that the City had begun a study "to look at creating a more village downtown character for the Lake Grove area."[72] Furthermore,

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[69] 42 U.S.C. § 1983. Monell v. Dept. of Social Services, 436 U.S. 658 (1978). *See also*, Bennett v. City of Slidell, 728 F.2d 762, 767 (5th Cir. 1984), *cert. denied*, 472 U.S. 1016 (1985) ("We view custom to be one form which policy takes and by which it is proven, and we use 'policy' to include the pattern of conduct in actual practice that may be called 'custom.'")

[70] Memorandum from Johnson Gardner, Economic Conditions Analysis for the Lake Grove Town Center Plan, Lake Oswego, Oregon (Sept. 30, 2002) at 4 (emphasis added), *available at* www.ci.oswego.or.us/.../LGTC%20Report/Technical%20Appendix/Part%201%20LGTC%20Plan%20Technical%20Appendix.pdf.

[71] App. B. at 2-3.

[72] *Id.*

signs at lower levels, so that they're more visible to pedestrians and less oriented to motorists, "can often be one of the tools that's used to create that character."[73]

## CONCLUSION

The Ninth Circuit's extension of this Court's *Thomas* exception to the *Freedman* rule is overbroad and should be limited. That limitation could take the form of restricting it to regulation of public fora, or, at the least, to restrictions of private property affecting conduct clearly not impinging upon speech, such as public health and protection from fire and similar hazards.

Given that the Ninth Circuit's position in *Armendariz v. Penman* precluded claims sounding in substantive due process, petitioners should have the opportunity to be heard on such claims.

Amicus Curiae International Sign Association respectfully urges this Court to grant the petition for a writ of certiorari in this case, to vacate the judgment below, and to remand for further proceedings not inconsistent with its opinion.

Respectfully submitted,

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[73] *Id.*

# APPENDIX A

This is a certified true copy of the original held by
the Lake Oswego Municipal Court as it appeared on 6-27-06
By /s/ Fran Beake Keeper of the Records

June 1,2005
MUNICIPAL COURT

Mr. Douglas M. Bragg
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Mr. David Powell
City Attorney
City of Lake Oswego
PO Box 369
Lake Oswego, OR 97034

Re: City of Lake Oswego v. Lake Grove Garden Center and
Darryl Eddy

Gentlemen:

The defendants are charged with multiple counts of
maintaining a pole sign in the City of Lake Oswego after the

mandated date for compliance of May 21,2004. The defendants have made certain stipulations of fact which, in conjunction with the evidence in this case, proves that the sign was in place after the amortization date of May 21, 2004, and that the pole sign was not legitimized via designation as an icon nor via a vision clearance allowance. The defendants' claim is that the sign code ordinance is unconstitutional as applied to their particular circumstances.

The sign code ordinance was enacted by the Lake Oswego City Council in 1985. It was revised in the early 1990's in response to constitutional issues and it's intent and purpose revisited by the legislative counsel. Amortization periods for pole signs as well as other matters were revisited in the years 2000 and 2003

The sign code ordinance's purpose, in general terms, appears aimed at the collective good. Focusing on the visibility of signs, the aesthetics and clutter created by unregulated sign practices, it appears that the ultimate intent was to improve the appearance of the City to the betterment of not only it's residents but also it's businesses. I found Mr. Paulsen's testimony helpful and credible. His testimony focused on the two issues of traffic safety and sign effectiveness for business purposes. While certainly not the defendants' burden of production) I was struck by the fact that I did not hear any evidence of a substantial increase in traffic accidents or other problems in those areas where the sign code has been implemented and monument signs have replaced pre-existing pole signs. Further, I fully accept Mr. Paulsen's testimony that signs are a significant advertising source and therefore, ultimately, a significant source of revenue for local businesses. What is missing from his testimony is the theory that the City would be so aesthetically improved by the implementation of the sign code that additional shoppers would frequent the area. This would provide an increased flow of traffic in front of the defendants' business which

would, again in theory, generate immediate new customers who would take the opportunity to shop at his store. It would also generate what I call potential customers in the form of those persons who pass by the Lake Grove Garden Center, notice it's location and remembered it for future reference.

The issues of traffic safety and commercial sign effectiveness are certainly important considerations. I believe the purposes designated by the City Council in their deliberations to be equally, if not more so. Regardless, it is not the appropriate position of this court to probe for the "real purpose" of the City Council when the purpose is clearly stated. I was struck by the fact that the sign code application was founded in the comprehensive plan and that there was substantial public input to both the comprehensive plan and the Council's deliberations on the sign code ordinance. The Council's purpose is as stated and will not be revisited by this court.

This case presents the classic situation of government regulating for what they deem to be the collective good with resulting impacts on local business owners in the form of loss of freedom (I can't have my sign exactly the way I want it) and significant outlays of money to conform with the ordinance in question. Having listened to the evidence and the argument of counsel and having reviewed the extensive pleadings in this case, I find that the sign code ordinance as applied to the defendants in this case represents a substantial government interest, the regulation applied to the defendants is content neutral and that the ordinance leaves open alternative channels for the content of the defendants' speech to overcome claims of unconstitutionality as applied to the defendants. I further find a sufficient rational basis for the burden placed upon the defendants expressive activity by the sign code ordinance [sic] Certainly the exact location of the defendants' speech as well as the physical area in which he is entitled to speak may be diminished. However, I do not find

that the regulations as applied to the defendant in this particular case are of such a degree to declare this matter unconstitutional as applied to the defendants. I make this finding with full awareness of the problems created for the defendants in complying with the ordinance. However, I believe the same burdens apply to other business owners as well.

Accordingly, I find the defendants guilty in cases 04-CI-61302 through 04-CI-63386. I am dismissing 04-CI-63389, 05-CI-63391 and 05-CI-63392 in the interests of justice.

I request that all parties coordinate a date and time for sentencing with the court clerk.

Very truly yours,

Wm. Bruce Shepley
Municipal Court Judge

WBS/jkb
cc: Fran Blake, Court Clerk

# APPENDIX B

IN THE MUNICIPAL COURT OF THE CITY OF LAKE OSWEGO
COUNTY OF CLACKAMAS, STATE OF OREGON

| | | |
|---|---|---|
| CITY OF LAKE OSWEGO, | ) | |
| | ) | |
| Plaintiff, | ) | No. 04-CI-61302, |
| | ) | et cetera |
| v. | ) | |
| | ) | |
| LAKE GROVE GARDEN CENTER | ) | |
| And DARRYL G. EDDY, | ) | |
| | ) | |
| Defendants. | ) | |

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED THAT the above-entitled Court and cause came on regularly for hearing before THE HONORABLE WILLIAM SHEPLEY on Tuesday, the 31st day of May, 2005, at the Lake Oswego Municipal Court, Lake Oswego, Oregon.

APPEARANCES BY:

TIMOTHY J. SERCOMBE
DAVID POWELL
Attorneys at Law
on behalf of the Plaintiff;

JOHN F. WINSTON
DOUGLAS M. BRAGG
Attorneys at Law
on behalf of the Defendants.

(excerpt from page 30)

MR. GALANTE: Specific to pole signs different from other signs I don't recall anything.
Q Okay. So, with regards to all signs generally, then, were there other aesthetic concerns that the city staff had?
A There's a compatibility review section of the Sign Code, which outlines the aesthetic issues and concerns that should be addressed for a sign.
Q Did the city staff come up with an objective formula for applying that design review clause?
A There is no objective review possible for a subjective standard.

(excerpt from pages 52-53)

Q Okay. And is it generally the City's desire, as reflected in actions of the City Council over the last 12 years, to encourage a change of commercial uses or change in the character of the Lake Grove district?
A Can you ask that again, please?
Q Was it, as reflected in City Council decisions over the past 12 years -- has there been a desire by the Council to affect the character of the Lake Grove area?
A Yes.
Q And what's been that change or desire?
A Well, some number of years ago -- and I'm not very specific on this because I don't manage the planning -- haven't managed the planning department during that time so I haven't been specifically a part of it -- but they did pursue Main Street program, which would create a more village character along Boones Ferry Road. And they did also fairly recently, even within the last few years, begin a study to look at creating a more village downtown character for the Lake Grove area.

Q And part of the desire to create a village character, does that involve having the signs at a lower level so that they're more visible to pedestrians and less oriented to motorists?
A That can often be one of the tools that's used to create that character.